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October 23, 2007

*Via Federal Express*

Arizona Corporation Commission  
Docket Control – Utilities Division  
1200 West Washington Street  
Phoenix, AZ 85007

RE: *In the Matter of Complaint of Eschelon Telecom of Arizona, Inc.  
against Qwest Corporation*  
Docket Nos. T-01051B-06-0257; T-03406A-06-0257

Dear Sir or Madam:

Enclosed for filing in connection with the above-referenced matter please find the original and 15 copies of Eschelon Telecom of Arizona, Inc.'s Post-Hearing Brief and Certificate of Service.

Sincerely,

Gregory Merz

Enclosures

cc: Jane Rodda, ALJ (w/enclosure via FedEx)  
Jason Topp, Qwest (w/enclosure via FedEx)  
Maureen Scott (w/enclosure via FedEx)  
See Attached Service List

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Arizona Corporation Commission  
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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman

JEFF HATCH-MILLER

Commissioner

KRISTIN K. MAYES

Commissioner

WILLIAM MUNDELL

Commissioner

GARY PIERCE

Commissioner

IN THE MATTER OF THE COMPLAINT OF )  
ESCHELON TELECOM OF ARIZONA, INC. )  
AGAINST QWEST CORPORATION )  
 )  
 )  
 )  
 )

DOCKET NO. T-01051B-06-0257  
T-03406A-06-0257

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF HENNEPIN )

Tobe L. Goldberg, being first duly sworn, deposes and says on oath that on the 23<sup>rd</sup> day of October, 2007, she served the attached:

**Eschelon Telecom of Arizona, Inc.'s Post-Hearing Brief**

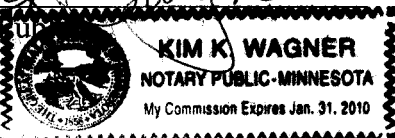
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Dated: 10/23/07

Tobe L. Goldberg  
Tobe L. Goldberg

Subscribed and sworn to before me  
this 23<sup>rd</sup> day of October, 2007.

Kim K. Wagner  
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NOTARY PUBLIC-MINNESOTA  
My Commission Expires Jan. 31, 2010

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Docket Nos. T-01051B-06-0257; T-03406A-06-0257

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1. **ICA PROVISIONS – ARIZONA**  
This is Exhibit 1 to Eschelon's Complaint (April 14, 2006). It was also an attachment to Eschelon's March 21, 2006 Escalation and Dispute Resolution Letter to Qwest. See Att. A-7 at 000134-000136 in Hrg. Ex. E-1 (Johnson Dir.).
2. **ICA PROVISIONS – ARIZONA – SELECTED PAGES**  
This Exhibit contains pages from the current, approved Qwest-Eschelon ICA in Arizona (per the discussion at the hearing, see Tr. Vol. II, p. 219, line 22- p. 220, line 16).
3. **EXPEDITE CAPABILITY FOR LOOPS**  
This one-page chart is Exhibit DD-2 to Mr. Denney's Rebuttal (Hrg. Ex. E-4).
4. **TABLE – STAFF RECOMMENDATIONS ARE WITHIN SCOPE OF COMPLAINT, DESPITE QWEST CLAIM THE CASE IS NARROWER**  
This Table has two columns – the first contains quotations and citations from conclusions in Staff Testimony, and the second contains quotations and citations from Eschelon's Complaint.
5. **TABLE – QWEST'S CURRENT THEMES: A REVIEW IN LIGHT OF THE EVIDENCE**  
The first page of this Exhibit is an Index to Qwest's themes by Row Number to provide a guide in finding information in the Table. This Table has two columns – The first column contains Qwest quotations and citations, including Qwest's entire Opening Statement at the hearing, when Qwest summarized its current themes in this case. The second column contains Eschelon's reply in light of the evidence, with quotations and citations from the record.

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<sup>1</sup> The Arbitrator's Report was actually issued on January 16, 2007 but is inadvertently dated 2006.



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## **EXECUTIVE SUMMARY**

(Endnotes to Executive Summary appear at end of the summary, before page 1 of Brief)

**Qwest Current Definitions:** For purposes of discussion in this Brief,<sup>i</sup> Eschelon will use the terms “design” and “non-design” (with the latter also being known as Plain Old Telephone Service (“POTS”)) as Qwest currently defines those terms.<sup>ii</sup>

**Non-Design/POTS:** Using Qwest’s definitions, the only non-design (POTS) services in the Interconnection Agreement (ICA) between Qwest and Eschelon are resold services (“Resale”).<sup>iii</sup> Resale, by definition, works the same as Qwest’s retail tariff (as Qwest resells the same services but at a wholesale discount).<sup>iv</sup> Expedites are available in emergency situations at no additional charge,<sup>v</sup> when resources are available.<sup>vi</sup> In addition, Qwest offers “express service” (which is defined as provisioning of access line dial tone prior to the standard installation service date) to its residential customers in Arizona at a \$22 flat (per order) fee for same-day installation.<sup>vii</sup> There is no dispute in this proceeding regarding Resale services.

**Design:** Qwest currently defines all Unbundled Network Element (“UNE” or “unbundled”) loops as design services. Currently, Qwest claims that DS0 loops have no retail analogue, while high capacity (DS1, DS3) unbundled loops have a retail analogue (private lines).<sup>viii</sup> Per Qwest, however, whether a retail analogue exists is *not* the basis for its position; rather it is based on the distinction between design and non-design services.<sup>ix</sup> Qwest defines DS0 loops, as well as DS1 and DS3 loops, as design services.<sup>x</sup> It is undisputed that Qwest provides expedites for design services, including in emergency situations, to itself and its retail customers.<sup>xi</sup> The retail expedite rate is \$200 per day advanced,<sup>xii</sup> with exceptions to charging a fee in some cases.<sup>xiii</sup> From April 28, 2000, through January 2, 2006, Qwest provided Eschelon the capability under the ICA to expedite orders for design services at no additional charge when certain emergency conditions were met.<sup>xiv</sup> Today, Qwest does not provide expedites of design services per the existing ICA in emergency or non-emergency situations – at any price.<sup>xv</sup> The ICA did not change.<sup>xvi</sup> Although Eschelon pays Qwest Commission approved rates,<sup>xvii</sup> and the Commission has approved an Individual Case Basis (ICB) wholesale rate for expedites,<sup>xviii</sup> Qwest requires CLECs to sign an amendment containing a retail rate of \$200 per day or Qwest will reject a CLEC’s expedite requests.<sup>xix</sup> With an amendment, Qwest will charge wholesale CLEC customers the retail rate even when the emergency conditions are met and resources are available,<sup>xx</sup> even though Qwest has not met its obligation to first show that the cost of performing that activity is not already recovered in an existing rate before charging a separate charge for the expedite.<sup>xxi</sup>

**ISSUE:** For design services: (1) should expedited service be available for design services? and, if so, (2) at what rate for a wholesale CLEC customer when the emergency conditions are met; and (3) at what rate for a wholesale CLEC customer when the emergency conditions are not met.

## **EXECUTIVE SUMMARY (CONTINUED)**

**RELIEF REQUESTED:** (For citations, *see* Row Nos. 36 & 37 to Ex. 5 to this Brief.)

Eschelon asks the Commission to grant the following relief:

Expedites of UNE loop orders will be provided at no additional charge when the emergency conditions are met. The emergency conditions available to CLECs at no additional charge for emergency-based expedites will include the conditions today, including the Version 22 conditions.

When another emergency-based condition (such as medical condition or outage) is met, Qwest may not deny the expedite on the grounds that the CLEC caused the disconnect in error.

In this case, until a different rate is set in another proceeding, the Commission should require Qwest to implement the Commission-approved Individual Case Basis (ICB) rate for expedites under the existing ICA for CLECs without an expedite amendment and via amendment for CLECs with an expedite amendment (*i.e.*, with the \$200 per day rate). (Qwest should provide any amendment to CLECs by notice and post it on its website, so that CLECs are aware of the availability of the amendment.) The rate would apply when the emergency conditions are not met.

The Commission should specify that, when calculating the ICB expedite charge, Qwest must use Commission-approved rates for any additional work activities performed to expedite an order. Qwest may not interpret "Individual Case Basis" to mean a rate of \$200 per day.<sup>xxii</sup>

In the alternative, based on the evidence in this case, the Commission may establish a maximum rate applying the cost principle articulated in Qwest's previous Arizona tariff retail rate: "in no event shall the charge exceed fifty percent (50%) of the total nonrecurring charges associated with the" order. The 50% would be applied to the Commission approved UNE rates for the applicable non-recurring installation charge.

The ICB rate (calculated using Commission approved rates or a maximum rate), or an interim rate, should remain available to CLECs until a rate is set in a cost docket. Qwest should be required to develop a cost-based rate for expedites in Phase III.

The Commission should adopt the recommendations Staff outlined in its Executive Summary. This may include a finding that Eschelon has complied with Conclusion No. 4, unless Staff indicates otherwise.

The Commission should make such findings and order such additional relief as deemed just and proper.

## Endnotes to Executive Summary:

<sup>i</sup> The terms “design” and “non-design” are not defined in the ICA. See Tr. Vol. II, p. 223, lines 5-8; Hrg. Ex. S-1 (Staff Testimony), p. 23, lines 17-21. Qwest’s application of the terms can be something of a moving target. For example, Qwest claims that emergency-based expedites apply only to POTS services, but Qwest provided emergency-based expedites for all unbundled loops for years (consistent with the fact that loops are used to provide POTS services, *see* next endnote), and when Qwest first placed DS1 capable loops on the product list for fee-added expedites, Qwest did not place DS0 loops on that list. See Row #3, Exhibit DD-2 to Hrg. Ex. E-4 (Denney Reb.) (attached as Exhibit 3 to this Brief). For purposes of discussion only, Eschelon will refer to unbundled loops as design services. Even assuming unbundled loops (DS0, DS1 and higher) are designed services, CLECs are entitled to the relief sought in the Complaint.

<sup>ii</sup> Eschelon uses unbundled loops to provide POTS services to its customers. See, e.g., Hrg. Ex. E-1 (Johnson Dir.), p. 5, line 17 – p. 6, line 7. Qwest has characterized the loop as a “pipe” over which services (including POTS) may be provided. Hrg. Ex. E-1 (Johnson Dir.), A-7 at 000124 (#3). Qwest cannot discriminate based on the means of delivering the service. See 51 C.F.R. § 51.311(a) (“The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunication carriers requesting access to that network element.”); 51 C.F.R. § 313(a) (“The terms and conditions pursuant to which an incumbent LC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carrier.”). *See also In the Matter of Qwest Communications, Inc.’s Section 271 Application*, ACC Docket No. T-00000A-97-0238, Staff’s Final Report and Recommendation on July 30-31, 2002 Supplemental Workshop (Report Two) (June 20, 2003). The Parties disagree on this issue, but the Commission need not reach the issue here to find that CLECs are entitled to the relief recommended by Staff and Eschelon.

<sup>iii</sup> Qwest does not provide its other products for providing POTS services -- QPP and QLSP -- per the ICA. Qwest provides them pursuant to separate commercial agreements. See Tr. Vol. I, p. 136, lines 6-16 (Denney).

<sup>iv</sup> See, e.g., ICA Att. 1, ¶2.3 (“If the resold services are purchased pursuant to tariffs and the tariff rates change, charges billed to [CLEC] for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. . . .”).

<sup>v</sup> All referenced in this Brief to “Versions” of the Qwest Product Catalog (“PCAT”) are Versions of the Qwest “Expedites and Escalations Overview” PCAT. For CLECs, see, e.g., Hrg. Ex. Q-3 (Martain Dir.) at JM-D5 (PCAT Version 41), p. 1. For Qwest Retail, see Qwest internal retail redacted Resale Product Database (RPD), Hrg. Ex. E-1, A-1, at 000026-000038 (Qwest Exh. No. JM-D4) (listing emergency-based conditions for which Qwest offers expedites at no additional charge for retail). The emergency conditions are not documented in Qwest’s tariffs. See Tr. Vol. II, p. 353, line 22 – p. 354, line 22; *Id.*, p. 358 line 19 – p. 359, line 8 (Martain).

<sup>vi</sup> Per Qwest’s PCAT, emergency-based expedites (at no additional fee) are subject to resource availability; expedites for a fee are not. *See* Hrg. Ex. E-2, BJJ-N (Expedites PCAT); *see also* Hrg. Ex. E-1, A-2 at 000062, #3 [Version 11 Eschelon Comment (“impact resources”) and Qwest CMP Response]; Hrg. Ex. Q-4 at JM-R1 (June 29, 2004 CMP meeting minutes).

<sup>vii</sup> See Qwest Arizona *Exchange and Network Services Price Cap Tariff*, Section 3, page 4 (Release 1) (discussed in Hrg. Ex. E-4, Denney Reb., p. 60, lines 6-10).

<sup>viii</sup> Hrg. Ex. Q-1, Albersheim Dir., p. 12, lines 18-20.

<sup>ix</sup> Hrg. Ex. Q-1, Albersheim Dir., p. 3, lines 13-17.

<sup>x</sup> See, e.g., Hrg. Ex. Q-1, Albersheim Dir., p. 10, lines 1-2: “Qwest provides expedites for designed services . . .”). *See also* Hrg. Ex. Q-1, Albersheim Dir., p. 4, lines 6-7. The question then becomes - at what rate for wholesale customers. (See Row Nos. 36-37 of Exhibit 5 to this Brief.)

<sup>xi</sup> Tr. Vol. 1, p. 199, lines 2-4 (Albersheim) (Qwest provides expedites to its retail customers as a regular part of its business); Vol. III, p. 520, lines 3-13 (Million) (emergencies).

<sup>xii</sup> Hrg. Ex. Q-1 (Albersheim), p. 10, lines 1-6 (\$200 per day).

<sup>xiii</sup> Hrg. Ex. Q-3 (Martain Dir.), p. 40, lines 4-10 (“the non-recurring charges would be *waived (including the expedite fee)*” (emphasis added)). Ms. Martain claimed, regarding this tariff, that Qwest makes the same “restoration” terms available through repair (*see id.* p. 41, lines 1-4), but not the expedite fee waiver terms. As to Qwest’s practices with respect to expedites and its tariff, Qwest both testified that it provides exceptions to charging (expedites at no additional charge) in emergency conditions even though they are not listed in its tariff and claimed that it did not provide expedites when its tariff said Qwest did

offer them. See Qwest internal retail redacted Resale Product Database (RPD), Hrg. Ex. E-1, A-1, at 000026-000038 (Qwest Exh. No. JM-D4) (listing emergency-based conditions – which are not listed in Qwest’s retail tariffs – for which Qwest offers expedites at no additional charge for retail); see also Tr. Vol. II, p. 358, lines (Martain) (“prior to 2004, although the language was in the tariff,” Qwest did not provide expedites for the fee identified in the Qwest tariff to its retail customers).

<sup>xiv</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, lines 7-12 & *id.* BJJ-D (Examples of expedite requests approved by Qwest for loop orders). See also Hrg. Ex. Q-5 (Novak Dir.), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”); Answer, p. 9, ¶14, lines 24-25 (“Qwest admits it previously expedited orders for unbundled loops on an expedited basis for Eschelon. . .”).

<sup>xv</sup> Qwest admitted that even the \$200 per day rate is not available under the ICA, even though it provides Qwest “may charge” for expedites (see Att. 5, ¶3.2.4.2.1), as Qwest requires a separate agreement. (Tr. Vol. II, p. 228, ln 19 – p. 229, ln 12, Albersheim). Evidence of this is that Eschelon offered to pay the \$200 per day in the rehabilitation center example, but Qwest said no under the ICA. (Hrg. Ex. E-1, A-7 at 000132.)

<sup>xvi</sup> See Row No. 1 (quoting ICA, Att. 5, ¶3.2.2.13), p. 1, of Exhibit 3 to this Brief (which is also Hrg. Ex. 4 (Denney Reb.) at DD-2) (“Expedite Capability for Loops,” 1-page chart).

<sup>xvii</sup> Tr. Vol. I, p. 138 (Denney), lines 22-24. When Commission-approved rates do not appear in the ICA, Qwest charges them pursuant to the Rates and Charges General Principle that charges must be in accordance with Commission rules and regulations. See ICA, Att. 1, ¶1.1, Exhibit 2 to this Brief. See Tr. Vol. I, p. 138 (Denney), lines 22-24; Hrg. Ex. E-3 (Webber/Denney Dir.), p. 41 at footnote 44. See also Hrg. Ex. #4 (Denney Reb.), DD-8, p. 5 (last full paragraph) (explaining application of Commission-approved rates from UNE cost cases and pointing out the difference between properly applying Commission-approved rates versus unilaterally imposing unapproved rates). See also Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (*cited in* Complaint, p. 6 at footnote 1) at ¶106 (“Eschelon clarifies that it does not object to the application of Commission approved rates.”); *see also id.* ¶105 (“In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates. However, even for rates included in an interconnection agreement, many agreements provide that they shall be superseded by any Commission approved rates in a generic costing docket. If Eschelon disputes whether Qwest is applying any charge correctly, it has the right to raise the issue with the Commission.”); *Id.* ¶108 (“To the extent unapproved rates are contained in Qwest’s SGAT, Staff believes that they should be considered interim and subject to true up once the Commission approves final rates. However, Staff does not believe that there should be any rates in the SGAT that Qwest has not separately filed with the Commission, along with cost support, for prior review and approval. To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a particular case through a negotiated interconnection agreement, could be a great impediment to competition.”); *Id.* ¶123 (“ . . . If there are no rates agreed to in an interconnection agreement for certain services, then the SGAT, which contains Commission approved rates, should be utilized.”). The SGAT contains a Commission-approved rate for expedites. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5).

<sup>xviii</sup> *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. See also Exhibit DD-4.

<sup>xix</sup> Tr., Vol. I, p. 168, ln 23 – p. 169, ln 2 (Mr. Steese opening). See also Hrg. Ex. Q-1 (Albersheim), p. 10, lines 1-6 (same price of \$200 per day for wholesale and retail customers).

<sup>xx</sup> Hrg. Ex. Q-1 (Albersheim), p. 12, lines 12-17.

<sup>xxi</sup> Hrg. Ex. E-5 (transcript pages from Arizona ICA arbitration hearing) at p. 200, lines 16-20; Hrg. Ex. E-6 (transcript pages from Washington ICA arbitration hearing), p. 193, line 23 – p. 194, line 2.

<sup>xxii</sup> An explicit ruling is needed on this point, because without it, Qwest unilaterally interprets “Individual Case Basis” to mean a non-individual, market-based rate of \$200 per day that will apply in every case, regardless of what activities are performed in each individual case (*e.g.*, whether a dispatch occurs or not). See Tr. Vol. II, p. 27, lines 13-16 (Albersheim).

1                                   **I. INTRODUCTION AND FACTUAL BACKGROUND**

2           Eschelon Telecom of Arizona, Inc. (“Eschelon”) has provided an Executive  
3   Summary, including the relief requested, at the outset of this Brief. In addition, Eschelon  
4   provides five Exhibits to this Brief: (1) “ICA Provisions – Arizona” (also Exhibit 1 to  
5   Eschelon’s Complaint); (2) ICA Provisions – Arizona – Selected Pages; (3) “Expedite  
6   Capability for Loops” (1-page chart, admitted as DD-4 to Hrg. Ex. 4); (4) Table – “Staff  
7   Recommendations are Within Scope of Complaint, Despite Qwest’s Claim the Case is  
8   Narrower”; and (5) Table – “Qwest’s Current Themes: A Review in light of the  
9   Evidence.” A Table of Authorities is also provided. In this Brief, Eschelon discusses the  
10   factual background first, and then provides its arguments.

11           **A. Intervals and Expedites Defined**

12           An interval for provisioning an order is a known number of days (or hours) from  
13   when a CLEC submits a service request/order until the date upon which service is  
14   scheduled to be delivered. For example, in Arizona, the normal interval for a DS1  
15   capable loop (which is sometimes referred to as a T-1) is five business days.<sup>1</sup> If a CLEC  
16   submits a complete and accurate service request for a DS1 capable loop on Monday (Day  
17   0), then the due date for service delivery is the following Monday (Day 5).

18           Provisioning intervals dictate the timing of service delivery to the End User  
19   Customer, as well as timing of the activities that the CLEC must perform in preparation

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<sup>1</sup> Tr. Vol. 1, p. 25, lines 16-24 (5 days for DS0 and DS1 capable loops) (Johnson); Hrg. Ex. Q-2 (Albersheim Reb.), p. 5, lines 8-11.

1 for service provisioning.<sup>2</sup> An interval for a retail End User Customer establishes the due  
2 date upon which the retail End User Customer is scheduled to receive working service.  
3 An interval for a wholesale customer (e.g., a CLEC) establishes the due date upon which  
4 Qwest will deliver the service to the CLEC. For unbundled network element ("UNE" or  
5 "unbundled") loops, there is still more work that the CLEC needs to do after Qwest  
6 delivers the UNE loop to make service work for CLEC's End User Customer.<sup>3</sup> Qwest  
7 does not perform the end user retail functions for a wholesale service. Qwest indicated  
8 that the Arizona Commission has found, given that the interval for retail customers is  
9 nine days, a five-day interval for CLEC DS1 capable loop orders is appropriate.<sup>4</sup> Qwest  
10 has the full nine days of the interval to prepare for service provisioning on the due date  
11 for its End User Customers. CLECs receive the loop from Qwest on Day 5 and then are  
12 allowed time to perform the additional work CLEC needs to do to make service work for  
13 CLEC's End User Customer.

14 When a customer -- wholesale or retail<sup>5</sup> -- submits a request to Qwest to shorten  
15 the length of the normal or "standard" interval to receive service earlier than the due date  
16 using the normal interval, Qwest refers to the customer's request as a request for an  
17 "expedite."<sup>6</sup> The Qwest-Eschelon interconnection agreement ("ICA") refers to the ability  
18 to receive service in less than the normal interval as the capability to "expedite" a service  
19 order.<sup>7</sup> For example, if a CLEC requests a timeframe of one day, instead of five days, for

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<sup>2</sup> Ms. Albersheim testified regarding the "standard" interval: "It is possible to provision it sooner sometimes, and Qwest will try to do if it can." Tr. Vol. II, p. 278, lines 12-13. To the extent that Ms. Albersheim is referring to delivery without a requested expedite or other change (e.g., without a revised Firm Order Confirmation), Ms. Albersheim is incorrect. Unexpected untimely delivery (early or late) causes problems (such as not allowing CLEC to prepare when service is delivered early unexpectedly). The interval, including requested expedites to the interval, is not used here to refer to unexpected premature delivery, which was not requested by CLEC.

<sup>3</sup> Tr. Vol. I, p. 28, lines 12-14

<sup>4</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 5, lines 8-11 (with no citation to authority).

1 a DS1 capable loop order, delivery of the loop to the CLEC is “expedited” by five days.  
2 An expedite, therefore, is to provision service more quickly than would otherwise be the  
3 case under the regularly-applicable service interval.

4 Expedites enable carriers to accommodate customers’ needs, such as when  
5 unanticipated circumstances arise (*e.g.*, when a customer’s service is disconnected  
6 unexpectedly).<sup>8</sup> If one carrier may accommodate its customer’s needs and another may  
7 not, the latter carrier is disadvantaged. Qwest’s witness, Ms. Albersheim, acknowledged  
8 that CLECs need the capability to receive expedited service in order to avoid being  
9 placed at a competitive disadvantage when she responded as follows:

10 Q. So you don't believe that it would create a competitive disadvantage  
11 for a CLEC if Qwest had the ability to offer expedites on orders but that  
12 same capability was not given to the CLEC?

13 A. Well, that's why we offer the capability to the CLECs.<sup>9</sup>

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<sup>5</sup> On July 15, 2004, Qwest said that fee-added expedites would allow CLECs to “expedite without reason” for a rate “like the Retail and Access customer.” See Qwest Version 22 CMP Response, Att. A-2 at 000062, #3, to Hrg. Ex. E-1 (Johnson Dir.).

<sup>6</sup> See, *e.g.*, for retail customers, Hrg. Ex. Q-3 at JM-D6, Qwest Retail Price Cap Tariff, §4.1.1 (heading of “Expedite”) and, for CLEC customers, Hrg. Ex. Q-3 at JM-D5, Qwest Expedites and Escalations Overview (“Expedites PCAT”) on page 1 (heading of “Expedites”).

<sup>7</sup> ICA, Att. 5, ¶3.2.2.13 at Eschelon Brief Exhibit 1, p. 1.

<sup>8</sup> Staff Direct (Hrg. Ex. S-1), p. 7, lines 1-2 (“The purpose of the Expedite Process is to allow a CLEC the opportunity to meet subscriber service needs.”); see also Hrg. Ex. E-1 (Johnson Dir.), p. 7, line 14 – p. 8, line 8.

<sup>9</sup> Tr., Vol. II, p. 254, lines 6-11 (Albersheim).



1 She later admitted that, while it creates a competitive disadvantage for a CLEC if Qwest  
2 had the ability to offer expedites on orders but that same capability was not given to the  
3 CLEC,<sup>10</sup> Qwest does *not* offer expedite capability to Eschelon for unbundled loops per  
4 the ICA:

5 "Q. As Eschelon's Interconnection Agreement exists today, Qwest does not  
6 provide Eschelon with the capability to receive an expedited loop; is that correct?  
7 A. That's correct."<sup>11</sup>

8 As discussed below, the Qwest-Eschelon interconnection agreement provides that Qwest  
9 shall provide Eschelon with the capability to expedite a service order.<sup>12</sup> Ms. Albersheim  
10 admitted that the expedite capability referenced in the ICA applies to both design  
11 (unbundled loops)<sup>13</sup> and non-designed (POTS) services.<sup>14</sup>

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<sup>10</sup> See *id.*

<sup>11</sup> Tr. Vol. II, p. 229, lines 9-12 (Albersheim).

<sup>12</sup> ICA, Att. 5, ¶3.2.2.13 at Eschelon Brief Exhibit 1, p. 1.

<sup>13</sup> The terms "design" and "non-design" are not defined in the ICA. See Tr. Vol. II, p. 223, lines 5-8; Hrg. Ex. S-1 (Staff Testimony), p. 23, lines 17-21. Qwest's application of the terms can be something of a moving target. For example, Qwest claims that emergency-based expedites apply only to POTS services, but when Qwest first placed DS1 capable loops on the product list for fee-added expedites, Qwest did not place DS0 loops on that list. See Row #3, Exhibit DD-2 to Hrg. Ex. E-4 (Denney Reb.) (attached as **Exhibit 3** to this Brief). For purposes of discussion only, Eschelon will refer to unbundled loops as design services. Even assuming unbundled loops (DS0, DS1 and higher) are designed services, CLECs are entitled to the relief sought in the Complaint.

<sup>14</sup> Tr., Vol. II, p. 257, lines 13-17 (Albersheim). Eschelon uses unbundled loops to provide POTS services to its customers. See, e.g., Hrg. Ex. E-1 (Johnson Dir.), p. 5, line 17 – p. 6, line 7. Qwest has characterized the loop as a "pipe" over which services (including POTS) may be provided. Hrg. Ex. E-1 (Johnson Dir.), A-7 at 000124 (#3). Qwest cannot discriminate based on the means of delivering the service. See 51 C.F.R. §51.311(a) ("The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunication carriers requesting access to that network element."); 51 C.F.R. §313(a) ("The terms and conditions pursuant to which an incumbent LC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carrier."). See also *In the Matter of Qwest Communications, Inc.'s Section 271 Application*, ACC Docket No. T-00000A-97-0238, Staff's Final Report and Recommendation on July 30-31, 2002 Supplemental Workshop (Report Two) (June 20, 2003). The Parties disagree on this issue, but the Commission need not reach the issue here to find that CLECs are entitled to the relief recommended by Staff and Eschelon.

1 **B. Expedites for Qwest – Itself and Its Retail Customers**

2 It is undisputed that Qwest provides expedites to itself and its retail customers.<sup>15</sup>

3 It is also undisputed that, at all relevant times, Qwest's effective tariffs indicated that  
4 Qwest offered expedites for a fee, with certain exceptions to charging fees,<sup>16</sup> to its retail  
5 customers. Before July 31, 2004, Qwest's tariff for designed services read: "The  
6 Expedited Order Charge is based on the extent to which the Access Order has been  
7 processed at the time the Company agrees to the expedited Service Date."<sup>17</sup> Further, the  
8 tariff stated: "but in no event shall the charge exceed fifty percent (50%) of the total  
9 nonrecurring charges associated with the Access Order."<sup>18</sup>

10 At the hearing, Qwest's witness, Ms. Martain, provided remarkable testimony  
11 that, despite tariff rules and regulations, "prior to 2004, although the language was in the  
12 tariff," Qwest did not provide expedites for the fee identified in the Qwest tariff to its  
13 retail customers.<sup>19</sup> She apparently asks this Commission to believe that in 2000, 2001,  
14 2002, and 2003, when a valued Qwest retail customer called Qwest with a request that,  
15 while urgent, may not have met an emergency condition (not identified in the tariff),  
16 Qwest routinely said no – even though it had the ability to say yes and charge the

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<sup>15</sup> See, e.g., Tr. Vol. 1, p. 199, lines 2-4 (Albersheim) (Qwest provides expedites to its retail customers as a regular part of its business); Vol. III, p. 520, lines 3-13 (Million).

<sup>16</sup> Hrg. Ex. Q-3 (Martain Dir.), p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be *waived (including the expedite fee)*" (emphasis added)). Ms. Martain claimed, regarding this tariff, that Qwest makes the same "restoration" terms available through repair (*see id.* p. 41, lines 1-4), but not the expedite fee waiver terms.

<sup>17</sup> See Qwest's Tariff F.C.C. #1, Original Page 5-25.

<sup>18</sup> *Id.*

<sup>19</sup> Tr. Vol. II, p. 358 (Martain).

1 customer per the tariff. Ms. Martain was working in wholesale, not retail, at the time,<sup>20</sup>  
2 and Qwest provided no evidence verifying her unsupported assertion. Even if true, it calls  
3 into question Qwest compliance with a Qwest tariff. When a tariff is alleged to be  
4 untrue, it also inhibits the ability to measure whether conduct is discriminatory  
5 (suggesting additional means of measurement are necessary). Qwest's own CMP  
6 documentation from 2004 indicates that Qwest was charging its retail customers the tariff  
7 rate in non-emergency situations at that time. Qwest said in CMP that in 2004 it was  
8 providing its "Retail and Access" customers with an "improved rate."<sup>21</sup> Note Qwest did  
9 not say it was introducing a "new" rate or starting to charge its retail customers a rate for  
10 the first time. This was a retail rate increase for an expedite capability that had been  
11 available for a fee for some time to Qwest retail customers.<sup>22</sup>

12 Ms. Martain also testified that, despite the absence of a list of emergency  
13 conditions in the retail tariff, prior to 2004 Qwest granted emergency-based expedites at  
14 no additional charge "for all customers."<sup>23</sup> "All customers" includes customers being  
15 served by design and non-design services, though Qwest now suggests that distinction is  
16 critical. Ms. Albersheim testified that Qwest "established two expedite processes  
17 *because* Qwest has two types of services: designed services and non-designed  
18 services,"<sup>24</sup> but it had two types of services when it claims it had one process for all

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<sup>20</sup> Hrg. Ex. Q-3 (Martain Dir.), p. 3, line 19. See also Tr. Vol. II, p. 358, lines 6-8 (Martain) ("I haven't worked on the retail side").

<sup>21</sup> Hrg. Ex. E-1 (Johnson Dir.), Att. A-2 at 000062, #3.

<sup>22</sup> The \$200 per day expedite fee was added to Qwest's Price Cap tariff effective Aug. 5, 2004. See Hrg. Ex. S-1 (Staff Testimony), p. 20, lines 18-19.

<sup>23</sup> Tr. Vol. II, p. 358 (Martain).

<sup>24</sup> Hrg. Ex. Q-1 (Albersheim Dir.), p. 3, lines 15-17 (emphasis added).

1 customers as well.<sup>25</sup> An explanation more consistent with the facts is that the CLEC  
2 request in February of 2004 to obtain expedites for a fee when the emergency conditions  
3 were not met (discussed below)<sup>26</sup> brought to the forefront the different treatment between  
4 Qwest retail customers (who received expedites for a fee in non-emergency situations)  
5 and CLEC customers (who did not). Instead of simply correcting that situation by  
6 offering CLECs expedites for a fee when the conditions are not met at a rate at no more  
7 than 50% of the applicable installation charge (which better reflects the relationship  
8 between installation and the expedite charge<sup>27</sup>), Qwest increased its rates before offering  
9 expedites for a fee to CLECs.

10 With respect to emergency conditions, the Qwest retail tariffs did not change.  
11 They did not identify the emergency conditions before 2004, and they do not identify  
12 them today. Therefore, for Qwest retail, the circumstances when they are and are not  
13 available is undocumented in the tariffs.<sup>28</sup> Yet, Qwest admits that, at least in some cases,  
14 Qwest offers its retail customers exceptions to charging a separate expedite fee when the  
15 emergency conditions are met. Regarding the ability to expedite orders today when the  
16 emergency conditions are met, Qwest admitted at the hearing that “in emergency  
17 situations it’s appropriate for CLECs just as it’s appropriate for Qwest’s retail and other  
18 wholesale customers.”<sup>29</sup> While Qwest now admits that, for all customers, it is

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<sup>25</sup> Hrg. Ex. Q-1 (Albersheim Dir.), p. 2, line 25 – p. 3, line 1 (the distinction is “long-standing”). Tr. Vol. I, p. 210, lines 3-6 (Albersheim).

<sup>26</sup> Qwest received Covad’s Change Request (CR #PC021904-1) on Feb. 20, 2004. See JM-R1, p. 1 to Hrg. Ex. Q-4 (Martain Reb.).

<sup>27</sup> Hrg. Ex. E-4 (Denney Reb.), pp. 62-63.

<sup>28</sup> Relying on Qwest to say when expedites are offered and when they are not particularly presents verification problems in light of Ms. Martain’s testimony that Qwest does not even act in accordance with the tariff. See Tr. Vol. II, p. 358 (Martain).

<sup>29</sup> See, e.g., Tr. Vol. III, p. 520, lines 3-13 (Million).

1 appropriate to expedite orders in emergency situations, Qwest asks this Commission to  
2 make a distinction between POTS and design services and find that emergency-based  
3 expedites should be provided to CLECs *at no additional charge* only for POTS (i.e., not  
4 loops). This position is based on the Qwest premise that retail and wholesale customers  
5 should pay the “same”<sup>30</sup> price for expedites or CLECs are receiving a “superior”  
6 service.<sup>31</sup> In other words, Qwest argues CLECs should not receive an expedite at no  
7 additional charge when Qwest retail customers do not receive an expedite at no additional  
8 charge (i.e., for design services). It is incorrect, however, to equate not providing a  
9 wholesale service *at the same price* as a retail service with superior service.<sup>32</sup> The issue  
10 is whether the charge to CLECs is nondiscriminatory and cost-based. In the case of  
11 emergency-based expedites, there may be no additional charge (over and above the  
12 installation charge) for the expedite, because Qwest does not incur additional costs that  
13 are not already recovered in existing rates, as discussed below.

14 **C. Provisions of the Parties’ Interconnection Agreement**

15 Eschelon is a facilities-based CLEC providing telecommunications services in  
16 Arizona.<sup>33</sup> The Arizona Commission approved the interconnection agreement between

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<sup>30</sup> See Hrg. Ex. Q-1 (Albersheim Dir.), p. 12, line 2. *See id.* p. 12, line 4 (“This is the essence of non-discrimination.”).

<sup>31</sup> Hrg. Ex. Q-3 (Martain Dir.), p. 41, lines 14-18.

<sup>32</sup> Hrg. Ex. E-4 (Denney Reb.), p. 51.

<sup>33</sup> Qwest’s Answer (¶2, p. 4, lines 1-2) admitted that Eschelon has its own switch in Arizona but Qwest denied that Eschelon is a facilities-based CLEC. The Commission, however, authorized Eschelon to provide competitive facilities-based and resold local exchange and interexchange telecommunications services in Arizona. See Hrg. Ex. E-1, BJJ-B (Documented Facts Matrix), p. 8, Row 20. The Documented Facts Matrix (BJJ-B) responds to statements Qwest has made (such as this one, or Qwest’s claim that Eschelon “did nothing,” Answer, p. 10, ¶B, line 25) and identifies documentation (often Qwest’s own documentation) to support the facts as alleged by Eschelon.

1 Eschelon and Qwest (then US WEST) on April 28, 2000.<sup>34</sup> Eschelon opted in to the  
2 interconnection agreement between AT&T and Qwest.<sup>35</sup> The interconnection agreement  
3 sets forth, among other things, the terms and conditions under which Qwest will provide  
4 service, including unbundled loops, to Eschelon. General "Terms and Conditions" are set  
5 forth in Part A of the ICA; terms relating to "Rates and Charges" are set forth in  
6 Attachment 1 to the ICA; and "Business Process Requirements" are set forth in  
7 Attachment 5 to the ICA. Terms other than Business Process Requirements for  
8 "Unbundled Network Elements" are set forth in Attachment 3 to the ICA. The  
9 interconnection agreement includes requirements under which Qwest will provide  
10 Eschelon with expedites in Section 3.2 of Attachment 5 to the ICA.

11 **Exhibit 1** to this Brief contains excerpts from the ICA. This is also Exhibit 1 to  
12 Eschelon's Complaint in this matter. **Exhibit 2** to this Brief contains selected pages from  
13 the current, approved Qwest-Eschelon ICA in Arizona (including the provisions quoted  
14 in Exhibit 1 and in this Brief<sup>36</sup>). Examples of applicable ICA provisions include the  
15 following:<sup>37</sup>

16 Att. 5, ¶3.2.2.12 Expedites Process: [Qwest] and [CLEC] shall mutually  
17 develop expedite procedures to be followed when CO-PROVIDER  
18 determines an expedite is required to meet subscriber service needs.

19 Att. 5, ¶3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability  
20 to expedite a service order. Within two (2) business hours after a request  
21 from [CLEC] for an expedited order, [Qwest] shall notify CO-provider of

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<sup>34</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, lines 8-9.

<sup>35</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, line 9.

<sup>36</sup> See Tr. Vol. II, p. 219, line 22- p. 220, line 16 (indicating Parties will attach ICA sections to Brief).

<sup>37</sup> References in the ICA to "U S WEST" are converted to "Qwest" in the Brief, and references to "CO-PROVIDER" in the ICA are converted to "CLEC."

1 U S WEST's confirmation to complete, or non complete, the order within  
2 the expedited interval.<sup>38</sup>

3 Part A, ¶31.1 [Qwest] shall conduct all activities and interfaces which are  
4 provided for under this Agreement with [CLEC] Customers in a carrier-  
5 neutral, nondiscriminatory manner.<sup>39</sup>

6 Att. 1, ¶1.2 "[N]othing in this Agreement shall prevent a Party through the  
7 dispute resolution process described in this Agreement from seeking to recover  
8 the costs and expenses, if any, it may incur . . . ."<sup>40</sup>

9 Part A, ¶27.2, "In the event [CLEC] and [Qwest] are unable to agree on certain  
10 items during the term of this Agreement, the Parties may identify such issues for  
11 arbitration before the Commission. . . ."<sup>41</sup>

12 The ICA also provides that "expedite charges may apply."<sup>42</sup> Regarding charges,  
13 the ICA provides broadly that charges must be in accordance with Commission rules and  
14 regulations.<sup>43</sup> The Commission has approved an Individual Case Basis ("ICB") rate for  
15 expedites.<sup>44</sup> In some cases, applying an ICB rate, there would be no additional charge

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<sup>38</sup> Exhibit 1 to this Brief, p. 1; Hrg. Ex. E-8 (ICA, Attachment 5, Section 3.2.2).

<sup>39</sup> Exhibit 1 to this Brief, p. 3.

<sup>40</sup> Exhibit 1 to this Brief, p. 3.

<sup>41</sup> Exhibit 1 to this Brief, p. 3.

<sup>42</sup> Exhibit 1 to this Brief, p. 1 (3.2.4.2.1); see also ICA, Attachment 5 (Hrg. Ex. E-8), Sections 3.2.4.2.1, 3.2.4.3.1, 3.2.4.4 (in Exhibit 2 to this Brief).

<sup>43</sup> ICA, Att. 1, ¶1.1, Exhibit 2 to this Brief. In addition to the Commission's cost orders (see, e.g. the next footnote below), the Commission has made rulings regarding the SGAT. See 271 Opinion and Order, Arizona Decision No. 66201 in ACC Docket No. T-00000A-97-0238, p. 28 ("It is further ordered that Qwest Corporation's SGAT, as modified from time to time after Commission approval, **shall remain available**, as the standard interconnection agreement, **until the Commission authorizes otherwise.**") (emphasis added). Despite this order and without prior Commission approval, Qwest unilaterally announced in a Level 1 CMP notice (effective immediately) that the SGAT is no longer available for opt-in. See Hrg. Ex. E-7. The SGAT includes the ICB expedite rate. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at \$9.20.14 for the Expedite rate element (which is listed as "ICB," with a reference to footnote 5 referring to the cost docket). In Qwest's offering for CLEC ICA negotiations, (Qwest's "template"), Qwest lists its \$200 per day expedite charge. See Hrg. Ex. E-2 (Johnson Reb.), BJJ-B, at Q000013, Ex. A §9.20.14.1.

<sup>44</sup> *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. Expedite charges are subject to this order, because Qwest "offered in this docket on an ICB price basis" the provision of expedites. See *id.*; *In the Matter of Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, ACC Docket No. T-00000A-00-0194 Phase II ("Phase II UNE Cost Docket"), Direct Testimony of Robert F.

1 (over and above the installation charge) for the expedite, because Qwest does not incur  
2 additional costs that are not already recovered. This is the case with emergency  
3 situations. Qwest provides emergency-based expedites (for no additional charge) only  
4 when resources are available.<sup>45</sup> If no resources are available, Qwest rejects the order.  
5 Therefore, Qwest incurs no cost to add resources.<sup>46</sup> An ICB rate would result in a charge  
6 if the CLEC is then willing to pay an additional charge to make resources available and  
7 Qwest makes them available for the purpose of providing the expedite.<sup>47</sup>

8 **D. Expedites Under the ICA**

9 From 2000, when the parties entered into their ICA, until January 2, 2006, Qwest  
10 provided expedites to Eschelon at no additional charge when certain specified emergency  
11 conditions were met.<sup>48</sup> Emergency conditions identified by Qwest as being eligible for  
12 an expedite at no additional charge included:

- 13 • Fire
- 14 • Flood
- 15 • Medical emergency
- 16 • National emergency

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Kennedy ("Kennedy Direct"), Qwest Corporation, March 15, 2001, p. 1. *See also* Exhibit DD-4 to Hrg. Ex. E-4 (Denney Reb.).

<sup>45</sup> Qwest's testimony on this point is inaccurate. *See* Hrg. Ex. E-4 (Denney Reb.), p. 39, FN 125. Ms. Albersheim testifies that Qwest provides expedites under its fee-added Pre-Approved Expedite process (at \$200 per day) "so long as resources are available." Hrg. Ex. Q-1 (Albersheim Dir.), p. 64, lines 7-8. Qwest's own PCAT shows that she has it backwards. Per Qwest's PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. *See* Hrg. Ex. E-2, BJJ-N (Expedites PCAT); *see also* Hrg. Ex. E-1, A-2 at 000062, #3 [Version 11 Eschelon Comment ("impact resources") and Qwest CMP Response]; Hrg. Ex. Q-4 at JM-R1 (June 29, 2004 CMP meeting minutes).

<sup>46</sup> Hrg. Ex. E-4, Denney Reb., p. 39.

<sup>47</sup> Covad (a DSL provider), in its description of change requesting an enhancement to expedites, provided an example of a customer migrating to a new ISP provider that "isn't as critical" as a medical emergency but for which Covad would be willing to pay an additional charge for an expedite. Hrg. Ex. Q-4 at JM-R1, p. 7. Covad said: "it shouldn't matter what the history or circumstances are, if we are willing to pay for the expedite." *Id.*

<sup>48</sup> Hrg. Ex. E-1 (Johnson), p. 11, lines 5-12.



- 1 • Conditions where your end-user is completely out of service (primary line)
- 2 • Disconnect in error by Qwest
- 3 • Requested service necessary for your end-user's grand opening event delayed
- 4 for facilities or equipment reasons with a future Ready For Service (RFS) date
- 5 • Delayed orders with a future RFS date that meet any of the above described
- 6 conditions
- 7 • National Security
- 8 • Business Classes of Service unable to dial 911 due to previous order activity
- 9 • Business Classes of Service where hunting, call forwarding or voice mail
- 10 features are not working correctly due to previous order activity where the
- 11 end-users business is being critically affected<sup>49</sup>

12 Emergency conditions had been identified, and the procedures for obtaining  
13 expedites at no additional charge in those emergency situations were in existence, when  
14 Eschelon and Qwest entered into their ICA.<sup>50</sup> Qwest subsequently documented the  
15 availability of expedites at no additional charge in emergency situations and the  
16 procedures for obtaining them in its Product Catalog ("PCAT").<sup>51</sup>

17 Not all of these existing emergency conditions were documented by Qwest in the  
18 PCAT at the same time. For example, the last three were documented in Version 22.  
19 Version 22 simply documented existing conditions; it did not change those conditions.<sup>52</sup>  
20 In addition, although not separately noted on Qwest's PCAT list, Qwest granted requests  
21 for expedites at no additional charge in emergencies when resources were available for  
22 CLEC disconnects in error.<sup>53</sup> Note, for example, that the PCAT does not say after each  
23 condition "unless caused by a CLEC disconnect in error."

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<sup>49</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 8, lines 10-p. 9, line 1; Id., A-1 at 000017 (Version 8.0); Att. A-3 at 000069 (Version 22.0); Att. E at 001646 (Version 40.0).

<sup>50</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 10, lines 9-12.

<sup>51</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 10, line 13- p. 11, line 3; Attachment A-2 at p. 000022.

<sup>52</sup> Tr. Vol. I, p. 33, lines 8-15 (Johnson).

<sup>53</sup> Tr. Vol. 1, p. 95, lines 15-25 (Johnson). See Hrg. Ex. E-1, Att. D, at 000444-000445 (containing examples of CLEC disconnect in errors where Qwest in fact granted the expedite requests for loop orders).

1           In each individual case when Eschelon would submit an expedite request, Qwest  
2       would determine if one of the listed emergency conditions were met and whether  
3       resources were available. If so, Qwest would expedite service, and Eschelon would pay  
4       only the applicable installation charge (as opposed to an additional charge to expedite  
5       service.)<sup>54</sup> If none of the listed conditions were met or no resources were available,  
6       Qwest would deny that expedite request.<sup>55</sup> Expedites at no additional charge in  
7       emergency situations were available under the existing ICA (without amendment) for all  
8       products, including unbundled loops.<sup>56</sup>

9           In February of 2004, Covad (a CLEC) asked Qwest to enhance expedited  
10      provisioning to also provide expedites for a fee in situations when the emergency  
11      conditions are not met. It made its request in the Change Management Process (“CMP”)  
12      in a Change Request (“CR”) entitled “Enhancement to Existing Expedite Process for  
13      Provisioning.”<sup>57</sup> In CMP, Qwest asks CLECs to indicate their “expectation” or “expected  
14      deliverable” from a change request, and Covad stated its expectation as follows:

15           Covad would like the ability to pay for an Expedited due date (restoral of  
16           disconnected end user). Covad would like to treat these like trouble reports and  
17           get the end user back in service in one day.<sup>58</sup>

18      Qwest also asks CLECs to indicate to the products to which the CLEC change request  
19      applies, and Covad included “all products” in its request.<sup>59</sup>

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<sup>54</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, lines 5 – 15 and p. 13, lines 2-7; see Hrg. Ex. E-1 (Johnson Dir.) at Attachment D for examples of loop orders expedited under the emergency expedites process; see also Staff Direct (Hearing Ex. S-1), p. 26, lines 3-9.

<sup>55</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, lines 15-17.

<sup>56</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 11, lines 12-15. See also Answer, p. 9, ¶14, lines 24-25; Hrg. Ex. Q-5 (Novak Dir.), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”).

<sup>57</sup> The CMP Detail summary regarding Covad’s Change Request (CR #PC021904-1) is in the record as both A-2 at 000046-000058 to Hrg. Ex. E-1 (Johnson Dir.) and as JM-R1 to Hrg. Ex. Q-4 (Martain Reb.).

<sup>58</sup> JM-R1 to Hrg. Ex. Q-4 (Martain Reb.), p. 7.

1 Covad indicated that its request applies any time CLEC is willing to pay a fee and  
2 therefore “it shouldn’t matter what the history or circumstances are.”<sup>60</sup> Covad provided  
3 examples, including an example of a migration of a customer to a new ISP provider that  
4 “isn’t as critical” as a medical emergency but for which Covad was willing to pay a fee.<sup>61</sup>  
5 That Qwest understood the breadth of Covad’s request is shown by Qwest’s own re-  
6 statement of Covad’s request in Qwest’s CMP Response:

7 This CR requests that Qwest enhance the expedite process to allow for an interval  
8 that is shorter than what is currently available for the product.<sup>62</sup>

9 Eschelon commented on the proposed enhancement to expedites. In response to  
10 Eschelon CMP comments, Eschelon obtained two commitments from Qwest: (1)  
11 implementation of the Covad Change Request would not result in replacement of the  
12 existing emergency-based option (*i.e.*, “continue with the existing process that is in  
13 place”); and (2) resources would remain available to process expedite requests under the  
14 existing emergency-based option even with the addition of the optional fee-added  
15 alternative (*i.e.*, “this will not impact resources”).<sup>63</sup> In addition, Eschelon made clear that  
16 rates for fee-added expedites would have to be available at Commission approved rates.<sup>64</sup>

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<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*, p. 8.

<sup>62</sup> See *id.*

<sup>63</sup> Both are reflected in Qwest’s CMP Response (Hrg. Ex. E-1, A-2 at 000062), quoted at Hrg. Ex. E-2, Johnson Reb., p. 9. See also Hrg. Ex. Q-4 at JM-R1 (June 29, 2004 CMP meeting minutes).

<sup>64</sup> Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 7(emphasis added), CMP minutes, stating:: “Jill Martain advised there would be charges in the ICA, and the amendment would have to be written. ***Bonnie said they would have to be commission approved rates.*** Jill advised she is not the expert on this process but she believes so.”

1 Qwest made expedites available to CLECs for a fee under certain conditions.<sup>65</sup>  
2 Qwest recognized that expedites were already available to its retail customers when it  
3 said it would now also allow CLECs to “expedite without reason” for a rate “*like the*  
4 *Retail and Access customer*.”<sup>66</sup> Before implementation of Version 11 (associated with  
5 Covad’s Change Request), the Qwest PCAT said: “*All* expedite requests require  
6 approval to ensure resource availability.”<sup>67</sup> When Qwest implemented Version 11 of the  
7 PCAT (associated with the Covad change request), Qwest redlined out and deleted this  
8 sentence,<sup>68</sup> as resource availability no longer applied to all expedites.<sup>69</sup>

9 Although Qwest finally made expedites available to CLECs for a fee (long after  
10 they were available for a fee to its retail customers<sup>70</sup>), Qwest did not implement the  
11 request consistent with Eschelon’s statement regarding the rate.<sup>71</sup> Qwest did not offer  
12 expedites at Commission approved rates and instead offered an ICA amendment with a  
13 \$200 per day retail rate. For Eschelon, when requesting expedites at no additional charge  
14 in emergency situations per its existing ICA, Qwest “continue[d] with the existing  
15 process that is in place.”<sup>72</sup> Therefore, Eschelon continued to receive expedites at no

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<sup>65</sup> PCAT Version 11 (associated with Covad’s change request) was implemented on July 31, 2004. See Hrg. Ex. E-1, A-2 at 000066.

<sup>66</sup> Qwest Version 11 CMP Response, Att. A-2 at 000062, #3, to Hrg. Ex. E-1, Johnson Dir.

<sup>67</sup> Hrg. Ex. E-2, BJJ-L, p. 1 (Version 6 of the expedites PCAT) (emphasis added).

<sup>68</sup> See Hrg. Ex. E-1, A-2 at 000040 (Qwest-prepared redline of the PCAT Version 11, showing deletion of this sentence).

<sup>69</sup> Qwest implemented fee-added expedites as *not* subject to resource availability (“hence, preapproval”). Tr. Vol. I, p. 43, lines 5-12 (Johnson).

<sup>70</sup> Before 2004, Qwest’s retail tariffs had made fee-added expedites available to Qwest’s retail customers, but the rate was capped at no more than 50% of the NRC to \$200 per day in 2004. See Tr. Vol. I, p. 152, line 25 – p. 153, line 15; Hrg. Ex. E-4 (Denney Reb.), pp. 62-63. See discussion above regarding Qwest – Itself and its Retail Customers.

<sup>71</sup> Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at p. 7 (quoted in above footnote).

<sup>72</sup> Hrg. Ex. E-1, A-2 at 000062, quoted at Hrg. Ex. E-2, Johnson Reb., p. 9.

1 additional charge when the emergency conditions were met, including expedites of  
2 unbundled loop orders (DS0 and DS1), after implementation of Version 11.

3 In its PCAT, Qwest referred to the options under which expedites were available  
4 as "Expedites Requiring Approval" for expedites at no additional charge in emergency  
5 situations (emergency-based) and as "Preapproved Expedites" for expedites at a fee  
6 ("fee-added"). During this time (and since then), Qwest also offers expedites for its retail  
7 customers for no charge (waiving not only the expedite fee but all non-recurring charges)  
8 under circumstances described in its retail tariff.<sup>73</sup> Qwest does not offer this waiver of  
9 charges to CLECs or document this circumstance for CLECs in its PCAT.<sup>74</sup> This Qwest  
10 retail tariff provision is evidence that Qwest makes exceptions to receiving a separate  
11 expedite fee for its retail designed service customers.

12 **E. Expedites After Qwest-Initiated Changes Were Implemented Over CLEC**  
13 **Objection**

14 On October 19, 2005, Qwest announced a Qwest-initiated Level 3 change, via the  
15 CMP written notice process, regarding expedites to take effect on January 3, 2006  
16 (Version 30).<sup>75</sup> Eschelon and other CLECs objected to this proposed change, as well as  
17 escalated another Qwest-initiated change announced in this timeframe (Version 27).<sup>76</sup>

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<sup>73</sup> Hrg. Ex. Q-3 (Martain Dir.), p. 40, lines 4-10 ("The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. This would include the non recurring charge to expedite a design service. However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, the non-recurring charges would be *waived (including the expedite fee)*" (emphasis added)).

<sup>74</sup> Hrg. Ex. E-3 (Webber/Denney Dir.), p. 30.

<sup>75</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 19, lines 10-11.

<sup>76</sup> See Hrg. Ex. E-2 (Johnson Reb.) at BJJ-K (Summary of Eschelon Objections and Dispute Resolution). Regarding the complicated manner in which Qwest implemented these changes, see Qwest CMP Response, Hrg. Ex. E-1, A-7 at 000122-000123 (including a "picture" providing a "timeline"). Ms. Johnson testified that she had never seen Qwest do a timeline like that before. Tr. Vol. I, p. 85, lines 2-5. Qwest admitted in its CMP Response that its practice in this case of issuing multiple changes in this overlapping time frame

1 Although Qwest now admits that Eschelon “timely complained about the changes,”<sup>77</sup>  
2 Qwest added “but it is equally true that Eschelon was involved in the process underlying  
3 the development of every aspect of the expedite process.”<sup>78</sup> Ms. Albersheim’s use of  
4 “every aspect” may suggest some sort of CLEC discussion, drafting, or other  
5 involvement or advance knowledge of the development of the Version 27 and 30 aspects  
6 of Qwest’s current expedite offering. There was none. Nor is there any relationship  
7 between those Qwest changes and the earlier work in CMP on the previous Qwest  
8 expedite terms, when emergency-based expedites were available for UNE loops. Qwest  
9 admitted there was no relationship in its own Version 27 and 30 notices.<sup>79</sup> Qwest had left  
10 the Covad Change Request (discussed above) open for a time while Qwest determined  
11 whether any other products would be added to fee-added expedites.<sup>80</sup> Once Qwest agreed  
12 to close/complete the Covad Change Request in July of 2005,<sup>81</sup> CLECs had a reasonable  
13 expectation that there would be no additional changes to the products under each process.

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(with some changes showing in redlines from some versions but not others) “led to the submittal of comments by the CLECs during the V30 comment cycle that actually addressed changes made in V27 of this document.” Hrg. Ex. E-1, A-7 at 000122. Though Qwest’s choice to proceed in this manner “led to” this result, Qwest would not respond to the comments on Version 27. *See id.* (Though Qwest claimed this was its practice, it did not point to a CMP provision supporting this practice and, even assuming there is one, exceptions may be allowed. See CMP Document, §16.0, JM-D1, p. 101.) Regarding the Version 27 changes, it is now undisputed that McLeod objected in an escalation of Version 27, which Eschelon and other CLECs joined. *See id.* at 000129 & 000120-000121. And, despite Ms. Martain’s earlier testimony that the “only CLEC who to my knowledge has disputed V30 in any way is Eschelon,” Hrg. Ex. E-3 (Martain Dir.), p. 27, lines 1-12, Qwest’s own document shows that several CLECs disputed V30 at the time. Hrg. Ex. E-1, A-7 at 000123-000128. Qwest simply implemented the changes anyway.

<sup>77</sup> Tr. Vol. I, p. 188, lines 2-3 (Albersheim) (referring to Version 30).

<sup>78</sup> Tr. Vol. I, p. 188, lines 3-6 (Albersheim).

<sup>79</sup> *See* Hrg. Ex. E-2 (Johnson Reb.), BJJ-F; *see also id.* BJJ-K at FN 4; *see also* footnote below (discussing BJJ-F).

<sup>80</sup> *See* Hrg. Ex. E-1, A-2 at 000058.

<sup>81</sup> *See* Hrg. Ex. E-1, A-2 at 000046 (“Completed 7/20/05”). PCAT Version 11 (associated with the Covad Change Request) was implemented on July 31, 2004 (approximately a year earlier). *See* Hrg. Ex. E-1, A-2 at 000066.

1 Versions 27 and 30 were purely Qwest developed changes,<sup>82</sup> announced in October of  
2 2005 by Level 3 Qwest notifications and *not* a Level 4 change request, that were not  
3 related to the Covad Change Request. Versions 27 and 30 were not mutually developed.  
4 They were opposed by Eschelon, as well as other CLECs.<sup>83</sup>

5 Qwest implemented the Version 27 and 30 changes over those CLEC objections.

6 Qwest clearly stated the effect of these Qwest changes at the hearing. Mr. Steese said:

7 But what did change management do with Versions 27 and 30? Qwest told the  
8 CLEC community uniformly, if you don't agree to pay a certain fee, \$200 per day  
9 per expedite, we're going to reject the order.<sup>84</sup>

10 Ms. Albersheim similarly clearly stated the purpose of the Qwest-initiated change:

11 The change at issue here is the *imposition of the fee* to expedite orders for design  
12 services.<sup>85</sup>

13 Before these Qwest-initiated changes, Eschelon could obtain expedites at no additional  
14 charge when the emergency conditions were met, including expedites of unbundled loop  
15 orders (DS0 and DS1). After these Qwest-initiated changes, Eschelon could not, because  
16 Qwest rejects these orders.<sup>86</sup> Before these Qwest-initiated changes, CLECs that signed  
17 the Qwest expedite amendment could obtain expedites at no additional charge when the  
18 emergency conditions were met for at least DS0 loops. After these Qwest-initiated

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<sup>82</sup> Despite Qwest's suggestions that these changes were associated with Covad's Change Request (*see, e.g.*, Answer, p. 10 ¶B, lines 20-24), Qwest specifically put "not applicable" on the Version 27 and 30 notices in the space Qwest itself provides for listing any "Associated CR Number." *See* Hrg. Ex. E-2 (Johnson Reb.), BJJ-F. On notices for earlier Versions, issued before the Covad Change Request was completed, Qwest placed the Covad Change Request ("CR") number in this category. *See, e.g., id.* Therefore, CLECs knew that these earlier versions were related to the Covad Change Request, while the Qwest Version 27 and 30 changes were not.

<sup>83</sup> *See* Hrg. Ex. E-1, A-7.

<sup>84</sup> Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening).

<sup>85</sup> Tr. Vol. I, p. 191, lines 16-17 (Albersheim) (emphasis added).

<sup>86</sup> Exhibit 3 to this Brief, Row #3 (Hrg. Ex. E-4 (Denney Reb.) at DD-2, Row #3).

1 changes, they could not because Qwest rejects these orders.<sup>87</sup> Rejecting customer orders  
2 – of a type previously not rejected – as a means to enforce an unwanted change is  
3 “forcing”<sup>88</sup> that change on other carriers.

4 Eschelon’s ICA did not change.<sup>89</sup> Both before and after these Qwest-initiated  
5 changes, the Qwest-Eschelon interconnection agreement provides that Qwest shall  
6 provide Eschelon with the capability to expedite a service order.<sup>90</sup> Although Qwest relies  
7 upon CMP for its position,<sup>91</sup> the CMP document provides:

8 In cases of conflict between the changes implemented through this CMP and any  
9 CLEC interconnection agreement (whether based on the Qwest SGAT or not), the  
10 rates, terms and conditions of such interconnection agreement shall prevail as  
11 between Qwest and the CLEC party to such interconnection agreement. In  
12 addition, if changes implemented through this CMP do not necessarily present a  
13 direct conflict with a CLEC interconnection agreement, but would abridge or  
14 expand the rights of a party to such agreement, the rates, terms and conditions of  
15 such interconnection agreement shall prevail as between Qwest and the CLEC  
16 party to such agreement.<sup>92</sup>

17 And, although it is sometimes difficult to discern in practice, Qwest states that it agrees  
18 rates are outside the scope of CMP.<sup>93</sup> As the above-quoted Qwest statements show,

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<sup>87</sup> Exhibit 3 to this Brief, Row #4 (Hrg. Ex. E-4 (Denney Reb.) at DD-2, Row #4).

<sup>88</sup> See Staff Testimony, p. 34, lines 10-11; *id.* p. 36, line 21 – p. 37, line 2. See also Hrg. Ex. E-4 (Denney Reb.), pp. 31-32.

<sup>89</sup> The CMP Scope provision and CMP redesign documents show that CMP was created in a manner to ensure that unwanted global (*i.e.*, uniform) changes would not be forced on CLECs, and that CLECs retained their Section 252 right to negotiate and arbitrate individual contracts with individual differences. Hrg. Ex. E-4 (Denney Reb.), p. 24, lines 5-10 (quoting CMP documents).

<sup>90</sup> ICA, Att. 5, ¶3.2.2.13 at Eschelon Brief Exhibit 1, p. 1; Exhibit 3 to this Brief, Row #1 (Hrg. Ex. E-4 (Denney Reb.) at DD-2, Row #1).

<sup>91</sup> Hrg. Ex. S-1 (Staff Testimony), p. 7, lines 15-16 (Q. What role did the CMP play in this particular case? Qwest has based its position on the CMP.”)

<sup>92</sup> Qwest CMP Document, §1.0, Hrg. Ex. E-1, A-9 at 000173.

<sup>93</sup> Hrg. Ex. Q-3, Martain Dir., p. 29, line 1; *see also* Hrg. Ex. S-1, Staff, p. 29, lines 4-5. Ironically, Qwest rejected McLeod’s and Eschelon’s joint CMP escalation of Version 27 on the grounds that “discussion around rates associated with an Interconnection Agreement are outside the scope of the CMP process.” Hrg. Ex. E-1, A-7 at 000129.



1     however, Qwest admits that its changes in CMP were designed for the “imposition” of “a  
2     certain fee, \$200 per day per expedite.”

3     **F.     Applicable Procedures When Parties to the ICA Disagree**

4             Qwest knew Eschelon did not agree on these issues during the term of the  
5     Agreement, but Qwest did not request dispute resolution under the ICA or request prior  
6     Commission approval before imposing its fee. This is true even though the ICA provides  
7     this is what Qwest should do when the companies “are unable to agree on certain issues  
8     during the term of the Agreement,” and the Commission requires it before imposing a  
9     fee.<sup>94</sup> Specifically, the Commission has said: “To allow Qwest to simply put rates into  
10    effect, without the agreement of the CLEC in a particular case through a negotiated  
11    interconnection agreement, could be a great impediment to competition.”<sup>95</sup> The ICA also  
12    specifically allows Qwest to seek “to recover its costs and expenses” incurred in  
13    complying with its obligations under the provisions of the ICA.<sup>96</sup> Although there is a  
14    Commission-approved ICB rate<sup>97</sup> that Qwest should have applied while seeking any  
15    change in that rate,<sup>98</sup> Qwest also did not seek Commission approval to charge a rate other  
16    than ICB for expedites. In addition, Qwest did not approve Eschelon’s expedite requests,

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<sup>94</sup> ICA, Part A, ¶27.2 (Exhibit 1 to this Brief, p. 3.)

<sup>95</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶108, lines 19-21. *See also id.* ¶108, lines 23-24 (“Staff is extremely concerned that Qwest would implement such a significant change through its CMP process without prior Commission approval.”), cited in Complaint, p. 6 at footnote 1.

<sup>96</sup> ICA, Att. 1, ¶1.2 (Exhibit 1 to this Brief, p. 3.)

<sup>97</sup> *See* Exhibit DD-4 to Hrg. Ex. E-4 (Denney Reb.).

<sup>98</sup> ICA, Att. 1, ¶1.1 (Exhibit 2 to this Brief.) Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶¶ 105-106 & 108-109.

1 bill Eschelon for them, and then handle payment and billing disputes, if any,<sup>99</sup> per these  
2 terms of the ICA.<sup>100</sup> Regarding the rehabilitation center situation, for example, Staff  
3 concluded: “Qwest should have expedited the request first and then followed up  
4 afterwards with the dispute resolution process. Clearly, [Named Customer] should have  
5 been thought of first; especially given the nature of the customer’s business.”<sup>101</sup>

6 Particularly at the outset of this case, Qwest suggested that Eschelon’s actions  
7 were insufficient;<sup>102</sup> Qwest said they demonstrated “intractability;”<sup>103</sup> Qwest alleged  
8 Eschelon “refused to participate using the rules,”<sup>104</sup> and Qwest even alleged that  
9 Eschelon “did nothing.”<sup>105</sup> In other words, Qwest sought to downplay CLEC

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<sup>99</sup> Qwest did not show that there would have been a certain dispute in the rehabilitation center example, because Eschelon offered to pay the \$200 per fee rate in that particular case. Hrg. Ex. E-1, A-7 at 000132. In addition, billing disputes are sometimes resolved by compromise before they reach the Commission (as anticipated by the dispute resolution provisions of the ICA), but Qwest did not even explore this alternative.

<sup>100</sup> ICA, Part A, §3 (Exhibit 1 to this Brief, p. 3.)

<sup>101</sup> Hrg. Ex. S-1, (Staff Testimony), p. 34, lines 19-21.

<sup>102</sup> Transcript of pre-hearing conference in this matter (Aug. 28, 2007), p. 11, lines 3-6 (“rather than following the change management process and challenging which it has a right to do all the way to the Commission the process as part of change management, it waited.”); p. 11, lines 15-17 (“refused to follow the agreed upon processes that were fully available to them to challenge anything that went out of change management”); p. 11, lines 24-25 (“Eschelon just refused to participate using the rules”); p. 14, lines 7-12 (“And so the whole point is there is a method specifically contemplated in the governing document governs all of change management that gave Eschelon the right and ability to get decisions on the propriety of the process in advance, and Eschelon simply opted not to take advantage of that.”) (Mr. Steese). See also Hrg. Ex. Q-3 (Martain Dir.), p. 32, lines 4-5 (“Eschelon did not invoke the CMP procedures for postponement, deferral or dispute resolution”). Eschelon had to lay out the many steps it did take, which were known to Qwest and generally reflected in Qwest’s own documentation (see, e.g., Hrg. Ex. E-1 at BJJ-B – “Documented Facts” Matrix), and cite to the CMP Document provisions showing both that the CMP procedures are optional and that the CMP specifically provides that Eschelon may bring a dispute resolution “at any time” before Qwest’s themes somewhat changed course. See Hrg. Ex. E-2, BJJ-P.

<sup>103</sup> Answer, p. 1, line 17. To support its allegation that Eschelon is intractable (*see id.*), Qwest suggested that, unlike Eschelon, “truly hundreds of CLECs opted into the new process.” Transcript of pre-hearing conference in this matter (Aug. 28, 2007) (Mr. Steese), p. 1, lines 21-22; *see also* Answer, Page 10 ¶ 14(B) lines 24-25 (“all the while, hundreds of CLECs opted into and began to utilize the expedite process; however, Eschelon did nothing”). Qwest has not introduced evidence to verify the alleged “hundreds” of CLECs, and the data presented by Staff tells a different story. See Hrg. Ex. S-1 (Staff Testimony), p. 35, lines 8-18.

<sup>104</sup> Transcript of pre-hearing conference in this matter (Aug. 28, 2007), p. 11, lines 24-25 (Mr. Steese).

<sup>105</sup> Answer, p. 10, ¶B, line 25.

1 objections,<sup>106</sup> given the requirement of mutuality in the agreement.<sup>107</sup> Since then, of  
2 course, Qwest has not identified any required rule that Eschelon did not follow and has  
3 had to admit that Eschelon properly objected.<sup>108</sup> But, Qwest continues to focus on the  
4 things that it claims Eschelon should have done but did not do regarding these Qwest-  
5 initiated changes.<sup>109</sup> Qwest made no showing that those things would have affected the  
6 result.<sup>110</sup> Those things are largely processes *in CMP*<sup>111</sup> that are expressly optional<sup>112</sup> and  
7 even inapplicable.<sup>113</sup> As indicated above, however, as between CMP and the ICA, *the*

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<sup>106</sup> Qwest continued to do some of this at the hearing. For example, while Ms. Martain admitted that Eschelon joined McLeod's escalation of Version 27, she added – but “*that escalation was basically we were unaware that we were implementing the process*. So we clarified that in our response, and the escalation went no further.” Tr. Vol. II, p. 335, lines 14-18 (Martain) (emphasis added). Although McLeod indicated in the “History of Item” portion of its escalation that it “was not even aware this issue was on table for discussion,” McLeod’s “**Reason for Escalation/Dispute**” said: “*McLeodUSA wants 2w/4w loops to remain in the Expedites Requiring Approval Process and thus incur no charges for an approved expedite.*” Hrg. Ex. E-1, A-7, at 000118 (emphasis added). Qwest rejected the escalation on the grounds that “discussion around rates associated with an Interconnection Agreement are outside the scope of the CMP process.” *Id.* at 000129. And, while Ms. Martain said the joint escalation “went no further,” it went all the way to the Commission – as part of this Complaint. *See id.* at 000130 (dispute resolution letter subject line) & Complaint ¶14, pp. 6-7 (citing Versions 27 and 30).

<sup>107</sup> Hrg. Ex. E-4 (Denney Reb.), p. 24, line 11 – p. 27, line 6.

<sup>108</sup> See Tr. Vol. I, p. 188, lines 2-3 (Albersheim) (“It is true that Eschelon timely complained about the changes to Version 30. . . .”); Tr. Vol. II, p. 335, lines 14-15 (Martain) (admitting Eschelon joined the McLeod escalation of Version 27). See also Hrg. Ex. E-2, BJJ-P; *id.*, BJJ-K (Summary of Eschelon Objections and Dispute Resolution). Although Qwest complained that Eschelon could have acted earlier, Qwest cited no statute of limitations or ICA provision suggesting the Complaint was untimely. To the contrary, Qwest’s own CMP Document states that a party may seek remedies in a regulatory or legal arena “at any time.” *See* Hrg. Ex. Q-3 (Martain Dir.), JM-D2, CMP Document, Section 15.0 (“Dispute Resolution Process”), p. 100.

<sup>109</sup> Tr. Vol. II, p. 335, lines 5-13 & p. 336, lines 20-23 (Martain opening statement).

<sup>110</sup> To the contrary, Ms. Martain admitted that, before sending the notice for the Version 30 changes to expedites, Qwest’s legal department had already reviewed Eschelon’s ICA and determined Qwest’s position that the change was not in conflict with the ICA. *See* Tr. Vol. II, p. 340, line 12 – p. 341, line 5. This is another indication that using additional, optional CMP tools would have proven ineffective (futile) because Qwest had already determined its position. *See also* footnote below (discussing DD-6).

<sup>111</sup> *See* Hrg. Ex. Q-3 (Martain Dir.), p. 32, lines 4-5 (“Eschelon did not invoke the CMP procedures for postponement, deferral or dispute resolution”).

<sup>112</sup> *See* Hrg. Ex. E-2, BJJ-P.

<sup>113</sup> Ms. Martain testified that Eschelon could have gone to the CMP Oversight Committee. Tr. Vol. II, p. 335, lines 11-12. As the name “Oversight” suggests, Section 18.0 of the CMP Document indicates that the Oversight Committee applies to issues raised with “using this CMP.” *See* Hrg. Ex. Q-3 (Martain Dir.), JM-D2, p. 110. Section 18.0 of the CMP Document not only provides that it is “optional,” but also that: “It will *not be used* when one or more processes documented in this CMP are available to obtain the resolution the submitter desires.” *Id.* (emphasis added). Given that Ms. Martain testified there were several other

1    **ICA** controls. It is ironic that Qwest focuses on additional, optional steps that Eschelon  
2    could have taken, when Qwest refused to pursue any of the above ICA provisions  
3    governing how to proceed when the parties disagree during the term of the ICA.<sup>114</sup>  
4            Qwest chose to withhold service and reject orders rather than pursue the  
5    applicable ICA dispute resolution provisions. An example of the consequence of  
6    Qwest's decision is the rehabilitation center situation described in the Chronology that is  
7    attached as Exhibit 1 to Staff's Testimony. In the end, Eschelon had to pursue this  
8    dispute resolution to seek to reverse Qwest's non-mutual actions toward CLECs in CMP,  
9    obtain relief in the rehabilitation center example, and enforce its rights under the contract  
10   and applicable statutes.<sup>115</sup>

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optional CMP processes available to Eschelon (Tr. Vol. II, p. 335, lines 7-14), Section 18.0 by its terms is inapplicable.

<sup>114</sup> It is also ironic that Qwest expected Eschelon to continually return to Qwest for an answer to this question (requesting postponement, dispute resolution, etc.), when in the rehabilitation center example, Qwest's own personnel were unwilling to return to Qwest for an answer. When Ms. Siewert suggested escalating internally at Qwest, Ms. Novak decided against it. They discussed a VP level request, but determined it was futile. Hrg. Ex. E-4 (Denney Reb.) at DD-6 ("because if we send it through the Alex and we don't put the expedite charges on it, and it's a VP expedite, he's going to deny it"). Particularly given that this issue is being litigated, there is no reason to believe Eschelon would have had any better luck returning to Qwest for an answer through various means than Qwest's own service management personnel believed they would have.

<sup>115</sup> See **Exhibit 4** to this Brief ("Table – Staff Recommendations are Within Scope of Complaint, Despite Qwest's Claim the Case is Narrower). See also **Exhibit 5** to this Brief ("Table – Qwest's Current Themes: A Review in Light of the Evidence"), Row Nos. 5-6 & 36-37.

## II. ARGUMENT

### A. Qwest Breached the Terms of the Parties' Interconnection Agreement by Refusing to Provide Eschelon with the Capacity to Expedite Loop Orders

#### **1. Prior to January 2006, Qwest provided Eschelon with expedited loop orders under the ICA; after January 2006 Qwest rejected expedited loop orders under the same ICA.**

The applicable contract language expressly provides that Qwest “shall provide” Eschelon with “the capability to expedite a service order.”<sup>116</sup> Unbundled loop requests are made on a service order.<sup>117</sup> The section of the contract where this provision is found – Attachment 5 – contains provisions relating to general business processes that apply to all products with no exception for loops.<sup>118</sup> Similarly, contrary to Qwest’s initial claims,<sup>119</sup> the ICA’s expedites provision is not limited to “nondesign” services.<sup>120</sup> Indeed, the ICA does not distinguish between “design” and “non-design” services.<sup>121</sup> And, Qwest specifically admitted at the hearing that the expedite capability referenced in the ICA applies to both design (unbundled loops) and non-designed (POTS) services.<sup>122</sup> That Qwest provided Eschelon with expedited loops under the ICA for nearly six years shows that both Qwest and Eschelon understood that the expedite provision applies to

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<sup>116</sup> ICA, Attachment 5 (Hrg. Ex. E-1), Section 3.2.2.

<sup>117</sup> Hrg. Ex. E-4, Denney Reb., p. 17, line 7.

<sup>118</sup> Tr. Vol. II, p. 227, lines 9-7 (Albersheim). Attachment 5 is entitled “Business Process Requirements.” Attachment 5 is Hearing Exhibit E-8.

<sup>119</sup> See, e.g., Albersheim Direct (Hrg. Ex. Q-1), p. 17, lines 21-23 (“*Eschelon does not have terms in its interconnection agreement permitting expedites for designed services*, and Eschelon has refused to sign an expedite amendment”) (emphasis added). Cf. Hrg. Ex. E-4 (Denney Reb.), p. 17, lines 5-17: The specific reference in Att. 5, ¶3.2.2.5 to expedites in the context of coordinated cutovers (an unbundled loop activity) shows it anticipates expedited service for loops.

<sup>120</sup> Tr. Vol. II, p. 227, lines 13-17 (Albersheim).

<sup>121</sup> Tr. Vol. II, p. 223, lines 1-11 and p. 227, lines 9-12 (Albersheim).

<sup>122</sup> Tr. Vol. II, p. 257, lines 13-17 (Albersheim).

1 loops; is not limited to requests for expedites (which are not granted/completed); and  
2 specifically includes the granting/completing of expedite requests for loop orders.<sup>123</sup>

3           **a.       Qwest Refusal to Continue to Perform Under the ICA**

4           The ICA did not change on January 3, 2006; what changed was Qwest's conduct.  
5 From April of 2000 until January 3, 2006, Qwest provided expedited loop orders under  
6 the terms of the ICA. Beginning on January 3, 2006, Qwest would no longer honor  
7 provisions in Eschelon's ICA. Without first seeking dispute resolution under the ICA or  
8 otherwise seeking Commission approval, Qwest concluded on its own that the ICA terms  
9 were no longer enough and that, if Eschelon wanted to expedite a loop order, it could no  
10 longer do so under the ICA. Instead, Qwest insisted on execution of an new agreement,  
11 amending the ICA to include an unapproved per day rate,<sup>124</sup> before it would continue to  
12 provide that capability.<sup>125</sup> Qwest's witness, Ms. Albersheim, explained Qwest's position  
13 as follows:

14           Q. Today Qwest does not provide Eschelon with the capability to receive  
15 an expedited loop. Is that not true?

16           A. Actually I don't agree because that ability is available through the  
17 amendment to the Interconnection Agreement.

18           Q. And an amendment -- you are a lawyer -- you understand that an  
19 amendment is another agreement; correct?

20           A. Yes. It amends the prior agreement, yes.

21           Q. Indeed, but it itself is an agreement; correct?

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<sup>123</sup> See Hrg. Ex. E-1 (Johnson Dir.) at Attachment D (examples of Eschelon expedites requests approved by Qwest for unbundled loop orders during ICA term). See Hrg. Ex. Q-5 (Novak Dir.), p. 5, lines 5-12 & lines 21-22 (Qwest "uniformly followed the process in existence at the time for expediting orders for unbundled loops"). Answer, p. 9, ¶14, lines 24-25 ("Qwest admits it previously expedited orders for unbundled loops on an expedited basis for Eschelon. . .").

<sup>124</sup> Tr. Vol. II, p. 228, line 19 – p. 229, line 12 (Albersheim).

<sup>125</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 18, line 10-p. 20, line 8.

1 A. Yes.

2 Q. I'm talking about Eschelon's Interconnection Agreement as it exists  
3 today.

4 A. Okay.

5 **Q. As Eschelon's Interconnection Agreement exists today, Qwest**  
6 **does not provide Eschelon with the capability to receive an expedited**  
7 **loop; is that correct?**

8 **A. That's correct.**<sup>126</sup>

9 Consistent with this Qwest admission, Commission Staff concluded: "By denying  
10 Eschelon the capability to Expedite an order without signing an amendment to the Qwest-  
11 Eschelon Interconnection Agreement, Staff believes that Qwest did not adhere to the  
12 terms and conditions of the current Qwest-Eschelon Interconnection Agreement pursuant  
13 to the language contained in Attachment 5, paragraph 3.2.2.13 of the Agreement."<sup>127</sup>

14 **b. Qwest Defense – Alleges CMP Modified Terms Under Which**  
15 **Parties Had Been Operating**<sup>128</sup>

16 The ICA requires that the parties "shall *mutually develop expedite procedures*"<sup>129</sup>  
17 to implement the mandatory ("shall provide") expedite capability. Qwest contends that  
18 changes made to the expedites process in the Change Management Process ("CMP") –  
19 which eliminated the emergency expedite option for unbundled loops and required  
20 Eschelon to enter into an ICA amendment with a per day rate to obtain an expedited loop  
21 – constitute the mutually developed expedite procedures provided for by the ICA.<sup>130</sup> In

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<sup>126</sup> Tr. Vol. II, p. 228, line 19- p. 229, line 12 (emphasis added).

<sup>127</sup> Hrg. Ex. S-1, (Staff Dir.), p. 37, lines 4-8; see Staff Conclusion #1, 1<sup>st</sup> sentence, Staff Executive Summary.

<sup>128</sup> See Hrg. Ex. S-1 (Staff Testimony), p. 7, lines 15-16 (Q. What role did the CMP play in this particular case? Qwest has based its position on the CMP.")

<sup>129</sup> ¶3.2.2.12, p. 1 of Exhibit 1 to this Brief (emphasis added). Also at ICA, Att. 5 (Hrg. Ex. E-8), ¶3.2.2.12.

<sup>130</sup> Tr. Vol. I, p. 166, lines 8-11 ("[T]he parties' course of dealing consistently and routinely has been to use the processes in change management to implement the terms of the interconnection agreement.") (opening

1 other words, Qwest reads the ICA provision as though it said “the parties shall mutually  
2 *develop a process to develop* expedite capability.” It does not say that; it requires the  
3 development of the expedite procedures themselves to be mutual. The evidence shows,  
4 however, that Eschelon, as well as other CLECs, objected to these changes but that  
5 Qwest implemented the changes over those objections.<sup>131</sup> A process that is proposed by  
6 one party, objected to by the other party, and implemented notwithstanding those  
7 objections cannot be said to have been “mutually developed” under any reasonable  
8 understanding of that term.<sup>132</sup> Synonyms of “mutually” include: “commonly,” “jointly,”  
9 “*in agreement*,” and “as one.”<sup>133</sup>

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statement of Qwest counsel); Tr. Vol. I, p. 187, lines 20-23 (“Qwest believes that the parties’ course of dealing shows that process created or modified in CMP become a part of the parties’ contractual agreement.”)

<sup>131</sup> Tr. Vol. II, p. 366, line 6- p. 369, line 13 (testimony of J. Martain); see also Hrg. Ex. E-1 (Johnson Dir.), p. 23, lines 12-14; Attachment A-7 at p. 000124 (Eschelon comment: “In Qwest’s response to Covad’s CR PC021904-1, Qwest said: “If a CLEC chooses not to amend their interconnection Agreement, the current expedite criteria and process will be used.” The current “expedite requiring approval process” allows a CLEC to request an expedite, at no charge, when the customer needs met certain criteria. Eschelon relied upon Qwest’s response and based its decision to comment, or not comment, on that response. Qwest is now failing to keep the commitments it made to CLECs in CMP, and in its response to Covad, by now changing its position on expedites and unilaterally imposing charges via a process change in CMP. Qwest’s proposed change to remove the existing approval required expedite process for designed products will negatively impact Eschelon and its customers;” see also Attachment A-7 at p. 000126 (McCloud comments: “Qwest’s removal of the 2w/4w analog loop exception from the expedites Requiring Approval process places CLECs at a competitive disadvantage . . .”), p. 000127 (Priority One comment: “Priority One objects to Qwest’s proposed change to remove the existing approval required expedites process for designed products and note [sic] that it will negatively impact Priority One and its customers.”); p. 000127 (Integra comments: “Integra objects to Qwest proposed change to remove the existing approval required expedite process for designed products. When Integra signed the Qwest Expedite Amendment we were not advised that by signing the amendment it would change the current Expedites Requiring Approval process. We signed the amendment believing that this would ADD to our options of having an order completed outside the standard interval. When Integra signed the amendment UBL DSO loops were not included as a product on the list of products in the Pre-Approved Expedites” list. When the UBL DSO was added to this list Integra did not comment as at that time we will believed the Expedites Requiring Approval process was in place for our use.”)

See also Staff Direct (Hrg. Ex. S-1), p. 30, lines 13-17 (describing objections by CLECs to Version 27 and 30 changes).

<sup>132</sup> To support Qwest’s argument, in her opening summary at the hearing, Ms. Albersheim claimed that Mr. Denney reads the words mutually developed in Section 3.2.2.12 as mutually agree (See Tr. Vol. I, p. 188, lines 8-9), as if they had a different result, and goes as far as to provide the definition of develop (See Tr. Vol. I, p. 189, line 24 – p. 190, line 4) to explain the difference. Qwest fails, however, to provide the



1 Qwest describes CMP as allowing CLECs the opportunity to “voice concerns and  
2 request changes to mitigate adverse impacts associated with a change.”<sup>134</sup> CMP offers no  
3 assurance, however, that input offered by CLECs will have an effect. As the evidence  
4 shows, Qwest has exercised the unilateral power to override objections that an individual  
5 CLEC or multiple CLECs might raise about product and process changes.<sup>135</sup> The  
6 changes made by Qwest to the expedite process with Version 30 – which were made over  
7 the objections of multiple CLECs – well illustrate this fact.<sup>136</sup> In arbitration proceedings  
8 in Minnesota, the Minnesota Commission rejected Qwest’s argument that specific  
9 processes and procedures should be addressed in CMP rather than set out in an ICA,

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definition of mutual, which is: “Mutual,” with respect to a feeling or action, is defined to mean  
“experienced or done by each of two or more parties toward the other or others.” The New Oxford  
Dictionary (2001).

<sup>133</sup> Roget’s Int’l Thesaurus (4th ed. 1977) (emphasis added).

<sup>134</sup> Hrg. Ex. Q-1 (Albersheim Dir.), p. 21, lines 15-18.

<sup>135</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 17, line 14 – p. 18, line 5.

<sup>136</sup> See also Tr. Vol. II, p. 377, line 15 – p. 378, line 17 (testimony of J. Martain):

Q. BY MR. MERZ: Ms. Martain, CLECs do not vote on whether product and  
process changes will be adopted, do they?

A. They do not vote in the same sense, no.

Q. Do they vote in any sense on product and processes changes?

A. Vote? A yes or no vote, no, it’s not taken.

Q. You mentioned in your testimony that CLECs can request a postponement of the  
change; is that right?

A. That’s correct.

Q. And if the CLEC makes such a request, Qwest is the one that decides whether to  
grant that postponement; is that right?

A. There is a process we go through, yes.

Q. In your direct testimony at page 30, line 16, you say, “Qwest does have a right to  
run its business, but it actively listens to the CLEC community and is very willing  
to implement changes that make good business sense for all parties involved.” Do  
you see that?

A. Yes.

Q. Qwest is the one in CMP that decides whether a change makes good business  
sense for all parties involved; is that right?

A. There is a decision from a business perspective, yes.

Q. And that’s Qwest’s decision?

A. Qwest’s business decision, yes.

1 finding that: “Eschelon has provided convincing evidence that the CMP process does not  
2 always provide CLECs with adequate protection from Qwest making important unilateral  
3 changes in the terms and conditions of interconnection.”<sup>137</sup>

4 Moreover, that a CLEC participates in CMP does not mean that it has abandoned  
5 its rights under its ICA. CMP is emphatically *not* the process by which parties agree to  
6 modify the terms of their interconnection agreement. To the contrary, the “CMP  
7 Document,” which describes CMP, provides that, in cases of conflict between a CLEC’s  
8 ICA and a change implemented through CMP, the rates, terms, terms and conditions  
9 contained in the ICA prevail.<sup>138</sup> Further, if a change made in CMP does not directly  
10 conflict with a CLEC’s ICA, but would either abridge or expand the rights of a party to  
11 the agreement, the terms of the ICA prevail.<sup>139</sup> Although Qwest contends that CMP is  
12 the vehicle by which the parties implemented the terms of the ICA,<sup>140</sup> Qwest is not  
13 relying on CMP to merely develop procedures to implement the existing terms of  
14 Eschelon’s ICA, but rather, to take away a right – the right to receive expedited loop  
15 orders – that the parties had mutually recognized as being available under the ICA. As  
16 Commission Staff correctly concluded, “Here there was clearly a change to the Expedite  
17 Process that abridged Eschelon’s rights under its existing Interconnection Agreement.

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<sup>137</sup> *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b)*, MPUC Docket No. P-5340, 421/IC-06-768 (*Minnesota Arbitration*), ALJs’ Report at ¶22, adopted by the Minnesota Public Utilities Commission in its Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding (March 30, 2007), p. 12.

<sup>138</sup> Qwest CMP Document, §1.0, Hrg. Ex. E-1 (Johnson Dir.), A-9 at 000173.

<sup>139</sup> Qwest CMP Document, §1.0, Hrg. Ex. E-1 (Johnson Dir.), A-9 at 000173.

<sup>140</sup> Tr. Vol. I, p. 166, lines 8-11 (opening statement of Qwest’s counsel).

1 Therefore, Eschelon was entitled to continue to operate under its current agreement and  
2 the process contemplated therein.”<sup>141</sup>

3 **2. Qwest cannot satisfy its obligation under the ICA by providing**  
4 **Eschelon with the capability to request expedite of a loop order.**

5 At the hearing, Qwest argued that “clearly the capability exists, a process exists,  
6 LSRs exist, personnel exist” for expedite requests,<sup>142</sup> suggesting that it had complied with  
7 the contract by permitting Eschelon to request expedite of a loop order, even though the  
8 answer to that request would always be “no.” As Qwest’s counsel noted in his opening  
9 statement, “[T]here should have been no question when [Eschelon] asked for an expedite  
10 for the rehabilitation center that Qwest was going to say, no, we’re not giving this to  
11 you.”<sup>143</sup> Qwest’s argument that it has complied with the contract by providing Eschelon  
12 with the capability to request, but not receive, an expedited loop is not only inconsistent  
13 with the “plain language”<sup>144</sup> of the contract, but also with well-established rules of  
14 contract law.

15 First, the language of a contract must be given effect as written.<sup>145</sup> Here, the  
16 contract requires Qwest to provide Eschelon with “the capability to expedite a service  
17 order” and not just the capability to “request” an expedite. Qwest’s attempt to re-write

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<sup>141</sup> Hrg. Ex. S-1 (Staff Testimony), p. 34, lines 5-7.

<sup>142</sup> Tr. Vol. I, p. 168, lines 13-16 (opening statement of Qwest counsel):

Qwest has clearly provided Eschelon with the capability to expedite service orders.  
A process exists. The LSR allows Eschelon to request an expedite. You have heard  
the discussion of a check box on the LSR, and also they have the option to call.  
Qwest has internal processes and trained personnel for managing requests for  
expedites. The capability is there. *See also* Tr. Vol. I, p. 183, lines 14-21  
(Albersheim).

<sup>143</sup> Tr. Vol. 1, p. 175, lines 8-11 (Mr. Steese opening).

<sup>144</sup> Tr. Vol. 1, p. 166, line 5 (Mr. Steese opening).

<sup>145</sup> *Hadley v. Southwest Properties, Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977); *Amfac Distribution Corporation v. J.B. Contractors, Inc.*, 146 Ariz. 19, 24, 703 P.2d 556, 570 (Ariz. Ct. App. 1985).

1 the contract should be rejected. It is undisputed that, although Eschelon can request an  
2 expedited loop, Qwest will not expedite the loop order for Eschelon under the current  
3 contract terms.<sup>146</sup> Eschelon does not have the capability to expedite a loop order under  
4 the ICA; without that capability, the ability to request an expedite is meaningless and of  
5 no value.

6 Qwest also contends that it has complied with the contract because the contract  
7 gives it the “total discretion to determine whether or not it will expedite an order.”<sup>147</sup>  
8 Per Qwest, the ICA places “no bounds” on its discretion.<sup>148</sup> Qwest’s argument ignores  
9 the contract language. First, the specific contract provision Qwest relies on – Attachment  
10 5, Section 3.2.2.13<sup>149</sup> -- states only that Qwest will notify Eschelon of confirmation to  
11 complete or not complete the expedite. It says nothing about granting Qwest “complete  
12 discretion” in making that decision. Second, the claim that Qwest has complete  
13 discretion to deny expedite requests – to the point of denying all such requests – is  
14 inconsistent with the contract requirement that Qwest shall provide Eschelon with the  
15 capability to expedite service. A contract should be interpreted, when possible, to give  
16 effect to all of its provisions.<sup>150</sup> Ms. Albersheim, an attorney, recognized this rule of  
17 construction when she claimed that Qwest’s interpretation “gives meaning to each and

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<sup>146</sup> Tr. Vol. II, p. 229, lines 9-12 (Albersheim).

<sup>147</sup> Tr. Vol. I, p. 184, lines 1-5; *see also* Hrg. Ex. Q-1 (Albersheim Dir.), p. 15, lines 4-7.

<sup>148</sup> “Q. Okay. Let me ask you this, though, because from your testimony it leads one to the conclusion that Qwest’s ability to expedite is so discretionary that there are no bounds to that discretion.

A. By the terms of the contract there are no bounds.” Tr. Vol. II, p. 263, lines 13-17 (Albersheim).

<sup>149</sup> Hrg. Ex. Q-1 (Albersheim Dir.), p. 14, lines 19-15; Tr., Vol. I, p. 183, line 4 – p. 184, line 5 (Albersheim).

<sup>150</sup> *Allen v. Honeywell Retirement Earnings Plan*, 382 F. Supp. 2d 1139, 1165 (D. Ariz. 2005); *see also* *Central Arizona Water Conservation District v. United States*, 32 F. Supp. 1117, 1128 (D. Ariz. 1998) (court must avoid a contract interpretation that would render a contract provision meaningless).

1 every word of those provisions.”<sup>151</sup> Qwest’s interpretation, however, does not give effect  
2 to the words “confirmation to complete” before “or not complete.” Third, Qwest’s  
3 argument ignores the requirement that the expedite procedures be “mutually developed.”  
4 The expedite procedures that the parties mutually operated under the nearly six years did  
5 not give Qwest unfettered discretion to deny Eschelon’s expedite requests. Rather,  
6 Qwest’s decision-making was confined to determining whether the request met one of the  
7 emergency conditions.

8 Qwest’s “total discretion” argument is not only inconsistent with the contract  
9 language and the way that the parties have, themselves, interpreted and applied that  
10 language since the contract’s inception, it is also inconsistent with well-established  
11 principles of Arizona contract law. First, the law implies a covenant of good faith and  
12 fair dealing in every contract.<sup>152</sup> The implied covenant of good faith and fair dealing  
13 prohibits a party from doing anything to prevent the other party to the contract from  
14 receiving the benefits of the agreement.<sup>153</sup> As the Arizona Supreme Court has observed,  
15 “Good faith performance or enforcement of a contract emphasizes faithfulness to an  
16 agreed common purpose and consistency with the justified expectations of the other  
17 party.”<sup>154</sup> To the extent that a party has discretion under the contract, the covenant of  
18 good faith and fair dealing requires that such discretion be exercised in good faith.<sup>155</sup>  
19 Qwest’s unilateral decision that Eschelon would no longer have the capability to expedite

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<sup>151</sup> Tr. Vol. I, p. 182, lines 19-21 (Albersheim).

<sup>152</sup> *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (Ariz. 1986).

<sup>153</sup> *Id.*

<sup>154</sup> *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 492, 38 P.3d 12, 30 (2002) (quoting Restatement (Second) of Contracts §205, cmt. a (1981).

<sup>155</sup> *Southwest Saving and Loan Ass’n v. Sunamp Systems, Inc.*, 172 Ariz. 553, 838 P.2d 1314, 558-59, 1319-20 (Ariz. Ct. App. 1992).

1 loop orders that Qwest provided to Eschelon under the contract for nearly six years is  
2 inconsistent with Qwest's contractual obligation to deal with Eschelon in good faith.  
3 Eschelon had a justifiable expectation that it would not only be permitted to request  
4 expedited service for loops, but that it would be able to continue to receive expedited  
5 service for loops.

6 Second, a contract that allows one party the unlimited right to decide later the  
7 nature or extent of performance is illusory and unenforceable.<sup>156</sup> The Arizona courts  
8 interpret contracts to avoid rendering a promise made under the contract illusory.<sup>157</sup>  
9 Qwest's argument that it has "total discretion" to deny Eschelon's expedite requests is the  
10 same as saying that it has no obligation to provide Eschelon with the capability to  
11 expedite service. Such an interpretation would render the obligation contained in  
12 Attachment 5, Section 3.2.2.12, to provide the capability to expedite service illusory and  
13 should, for this reason as well, be rejected.

14 **B. The Rehabilitation Center Incident Illustrates the Harm that can Result**  
15 **from Qwest's Conduct in Rejecting Orders as a Means to Force an**  
16 **Unwanted Amendment on CLECs**

17 **1. Staff's recommendations are within the scope of the Complaint,**  
18 **which is not limited to this example**

19 Qwest commenced its cross examination of Ms. Johnson with a series of  
20 questions going to whether she was testifying on behalf of Eschelon and whether, in her  
21 mind, she was thinking of the Statement of Generally Available Terms ("SGAT") at the

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<sup>156</sup> *Allen D. Shadron, Inc. v. E. Cole*, 101 Ariz. 122, 123-24, 416 P.2d 555, 556-57 (Ariz. 1966) (quoting 1 Williston, Contracts §43 (3<sup>rd</sup> ed.)).

<sup>157</sup> *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588-89, 566 P.2d 1332, 1334-35 (Ariz. 1977).

1 time the Complaint was filed.<sup>158</sup> In Qwest's opening statement, Qwest then suggested  
2 that the scope of this case is narrower than it is.<sup>159</sup> Time would be better spent reviewing  
3 the terms of Eschelon's Complaint itself. The Complaint specifically references and  
4 quotes from the Qwest SGAT, and states: "Together, these provisions of the ICA, CMP  
5 Document, PCAT notices, and SGAT collectively show a regulatory regime designed to  
6 ensure that Qwest cannot undermine Commission approved ICA terms by unilaterally  
7 altering them through its own PCAT."<sup>160</sup> Note that this statement referred to all  
8 Commission approved ICA terms; not only those of Eschelon.<sup>161</sup> Eschelon specifically  
9 alleged that Qwest's amendment terms and its refusal to provide expedite capability for  
10 loops not only violate the ICA but also the public interest and state and federal law.<sup>162</sup>  
11 Eschelon challenged Qwest's rate and requested a Commission-approved rate, as well as  
12 asked to pay no additional charge when the emergency conditions are met.<sup>163</sup>  
13 Eschelon discusses the Rehabilitation Center incident here as an example of harm  
14 caused by Qwest's conduct toward CLECs, just as Eschelon did in its Complaint. While  
15 Eschelon should be compensated for the over-charge in that situation,<sup>164</sup> that is just a  
16 portion of the relief requested in the Complaint, most of which is not limited to this

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<sup>158</sup> Tr. Vol. 1, p. 23, line 12 – p. 24, line 24.

<sup>159</sup> See, e.g., Qwest (Mr. Steese), Tr. Vol. 1, p. 165, line 23 – p. 166, line 3. See Exhibit 4 to this Brief.

<sup>160</sup> See, e.g., Complaint, ¶12, p. 6, lines 14-16 & ¶ D, p. 6, lines 7-13 (quoting SGAT ) & ¶B, p. 5, lines 22-24 (quoting SGAT) & ¶C, pp. 5-6 (quoting Exhibit G to the SGAT – the CMP Document).

<sup>161</sup> See also Complaint, p. 7, ¶14, line 1 (referring to the "existing ICAs" of CLECs).

<sup>162</sup> See, e.g., Complaint, p. 8, ¶¶19-21, lines 4-20.

<sup>163</sup> See, e.g., Complaint, p. 1, lines 19-21 & p.14, ¶II.

<sup>164</sup> "The Qwest-Eschelon Interconnection Agreement does allow Qwest the ability to impose a fee on Eschelon for expediting orders. Until recently, common practice has been that Qwest has chosen not to charge an additional expedite fee for all products/services that met certain emergency conditions/criteria. Qwest should reimburse the additional \$1800 plus interest (if applicable) that was charged to Eschelon in this particular Complaint." (Hrg. Ex. S-1, Staff Conclusion #3, Staff Executive Summary.) See also Complaint, ¶J, Page 14, lines 4-7.

1 example.<sup>165</sup> In its Complaint, Eschelon disputed the non-mutual changes Qwest  
2 implemented toward CLECs via its CMP notices and, in particular, disputed Qwest's  
3 refusal to provide expedited orders for loops unless CLECs sign an unnecessary  
4 amendment.<sup>166</sup> Regarding Qwest's rejection of orders, Eschelon also alleged that Qwest  
5 "engaged in self-help by demanding an amendment while customers are out of service . .  
6 . and using such customer outages as leverage to force Eschelon to sign the  
7 discriminatory, anti-competitive Qwest amendment."<sup>167</sup> Eschelon said this conduct  
8 included "a customer serving individuals with disabilities,"<sup>168</sup> and Eschelon provided the  
9 facts of that incident as an example of the harm caused by Qwest's blanket refusal to  
10 provide expedite capability for loop orders under the existing ICA.<sup>169</sup>

11 Qwest makes essentially four arguments in response to the Rehabilitation Center  
12 example: (1) the example does not meet any of the emergency conditions (neither a  
13 medical emergency nor an outage/911 situation);<sup>170</sup> (2) Eschelon could have done more  
14 earlier for this customer;<sup>171</sup> (3) Eschelon could have checked the expedite box on the  
15 LSR;<sup>172</sup> and (4) Eschelon's "incompetence"<sup>173</sup> in making this disconnect in error is

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<sup>165</sup> See, e.g., Complaint, pp. 13-14, ¶¶ A-K. See also citations in Exhibit 4 to this Brief ("Table – Staff Recommendations are Within Scope of Complaint, Despite Qwest's Claim Case is Narrower").

<sup>166</sup> See, e.g., Complaint, p. 1, lines 14-20 & pp. 6-7.

<sup>167</sup> See, e.g., Complaint, p. 1, lines 21-24.

<sup>168</sup> See, e.g., Complaint, p. 1, line 22.

<sup>169</sup> See, e.g., Complaint, p. 2, lines 1-16 & pp. 8-13, ¶¶ 22-42.

<sup>170</sup> Hrg. Ex. Q-5 (Novak Dir.), p. 13, lines 16-27; Hrg. Ex. Q-6 (Novak Reb.), p. 1, lines 21-23.

<sup>171</sup> Hrg. Ex. Q-5 (Novak Dir.), pp. 10-11.

<sup>172</sup> Hrg. Ex. Q-5 (Novak Dir.), p. 11, lines 2-4.

<sup>173</sup> In its Complaint at p. 2, lines 3-4 and paragraph 26, Eschelon admits that this was an Eschelon disconnect in error. On page 1, line 17 of its Answer, Qwest states that Eschelon's customers found themselves out of service because of Eschelon's "incompetence." On page 2, lines 22-23 of its Answer, Qwest states that the cause of the disconnect was Eschelon's "incompetence." On page 2, line 25, Qwest again refers to Eschelon's "incompetence." Qwest's PCAT shows that Qwest itself causes disconnects in error frequently enough to warrant a provision in the PCAT addressing them (see Hrg. Ex. Q-3, JM-D5, p. 1, 6<sup>th</sup> bullet), and Eschelon provided actual examples of Qwest disconnects in errors that impacted Eschelon and its



1 grounds for denying relief, even assuming an emergency condition was met. Qwest  
2 appears to be saying that Eschelon picked a bad example. This is a different approach  
3 from Qwest's Answer in this matter, in which Qwest alleged that Eschelon waited for an  
4 example that was so good that Eschelon could be accused of having "cherry-picked" it  
5 "in hopes of (1) portraying Qwest as an unreasonable, heartless corporate citizen, and (2)  
6 contaminating the parties' upcoming arbitration."<sup>174</sup> Based on the evidence, the Staff  
7 made several recommendations in this case.<sup>175</sup> While this case remains to be decided,  
8 these Staff conclusions at least suggest that Eschelon had sufficient good faith basis to  
9 come to the Commission to seek resolution of this dispute, and that Eschelon was not  
10 acting out of "intractability and incompetence."<sup>176</sup>

11 Before addressing Qwest's four arguments as to the portion of Eschelon's request  
12 for relief relating to this example, it is important to ask whether they make any difference  
13 to the other claims in this case and Eschelon's other claims for relief. Assume Eschelon  
14 had "cherry-picked" the perfect example. In that example: (1) the parties agree that an  
15 emergency exists and one or more of the emergency conditions are met; (2) Eschelon  
16 escalated the instant it learned of the emergency; (3) Eschelon checked the expedite box  
17 on the order; and (4) the emergency is not the result of a CLEC disconnect in error.  
18 Would that example lead to a different result? No. Qwest pointedly admitted this at the  
19 hearing:

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customers (Hrg. Ex. E-2, BJJ-C). Particularly in light of the fact that disconnects in error are not unique to Eschelon (*see id.*), Qwest's repeated references to alleged "incompetence" in this one example by Eschelon (a multi-million dollar wholesale customer of Qwest's) were particularly unnecessary.

<sup>174</sup> Answer, p. 1, lines 17- 20. *See also* Transcript of pre-hearing conference in this matter (Aug. 28, 2007), p. 11, lines 10-13 (Mr. Steese): "And only when it affected a customer that they thought 'ah-ha,' we think that this might be one that will help turn the tide away from Qwest did they initiate a complaint."

<sup>175</sup> See Hrg. Ex. S-1 (Staff Testimony), Executive Summary, Conclusions 1-7.

<sup>176</sup> Answer, p. 1, line 17.

1 [T]here should have been no question when they asked for an expedite for the  
2 rehabilitation center that Qwest was going to say, no, we're not giving this to  
3 you."<sup>177</sup>

4 But what did change management do with Versions 27 and 30? Qwest told the  
5 CLEC community uniformly, if you don't agree to pay a certain fee, \$200 per day  
6 per expedite, we're going to reject the order. *You know in advance.*<sup>178</sup>

7 A decision is needed from the Commission to reverse this Qwest policy toward  
8 CLECs.

9 **2. Qwest's "business decision" to single out Eschelon for additional**  
10 **amendment requirements is contrary to this Commission's 271 Order**

11 Ms. Novak of Qwest began her pre-filed Direct Testimony with an attack on  
12 Eschelon's alleged payment history, even though Qwest does not dispute, and seems to  
13 acknowledge,<sup>179</sup> that Eschelon did pay the amount Qwest charged for the private line  
14 expedite. In his pre-filed Rebuttal Testimony (Hearing Exhibit E-4), Mr. Denney  
15 attached responsive information in Confidential Exhibit DD-8 demonstrating that  
16 Qwest's claims are unfounded. Significantly, in the course of Ms. Novak's payment  
17 testimony, Ms. Novak said: "Based on the past history of Eschelon's failure to pay for  
18 services rendered, as well as its current conduct, Qwest has made a business decision to  
19 require Eschelon to enter into an amendment to its ICAs to order *any* service that is not  
20 listed in the ICAs with a corresponding rate."<sup>180</sup> Qwest's statement is broad enough to  
21 cover approved and unapproved rates. Qwest has not shown that there is no other CLEC  
22 with which Qwest has billing disputes similar to those described in Confidential Exhibit  
23 DD-8, nor has it shown that it would prevail if its billing disputes with Eschelon were

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<sup>177</sup> Tr. Vol. I, p. 175, lines 17-11 (Mr. Steese opening).

<sup>178</sup> Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening) (emphasis added).

<sup>179</sup> Martain Direct, p. 41, lines 20-21.

<sup>180</sup> Hrg. Ex. Q-5 (Novak Dir.), p. 4, lines 21-24 (emphasis added).

1 brought to the state commissions. Certainly, Qwest has not received any ruling from this  
2 Commission making any such finding with respect to Eschelon.

3 Yet, Qwest has made a “business decision” to “require” Eschelon to enter into  
4 additional ICA amendments. Ms. Novak did not say “request” an amendment. Despite  
5 Qwest’s protestations about statements that Qwest can force CLECs to sign  
6 amendments,<sup>181</sup> Qwest implicitly acknowledges in this statement that Qwest (which this  
7 case shows will reject orders to enforce its position) can “require” amendments from a  
8 CLEC. Qwest’s approach to implementing a rate is the opposite of that described in this  
9 Commission’s 271 Order (which is discussed below in Section E).<sup>182</sup> Moreover, Qwest’s  
10 approach singles out Eschelon for different treatment, because per that Order other  
11 CLECs obtain Commission approved rates, even when not expressly identified in their  
12 ICA,<sup>183</sup> whereas Qwest has made a “business decision” to start requesting additional  
13 amendments from Eschelon. To the extent that Qwest is referring to unapproved rates,  
14 this is particularly contrary to the approach described in that Order.<sup>184</sup>

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<sup>181</sup> Tr. Vol. I, p. 163, lines 14-23 (Mr. Denney response and Mr. Steese objection).

<sup>182</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (*cited in* Complaint, p. 6 at footnote 1), at ¶¶105-106 & 108-109.

<sup>183</sup> *Id.* at ¶¶105 (“even for rates included in an interconnection agreement, many agreements provide that they shall be superseded by any Commission approved rates in a generic costing docket”); *Id.* (“In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates. . .”). The SGAT contains a Commission-approved rate for expedites. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5).

<sup>184</sup> *Id.* ¶ 108 (“Staff does not believe that there should be any rates in the SGAT that Qwest has not separately filed with the Commission, along with cost support, for *prior* review and approval. To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a particular case through a negotiated interconnection agreement, could be a great impediment to competition.”) (emphasis added).

1                   **3. Eschelon demonstrated that it is entitled to compensation for the**  
2                   **Rehabilitation Center incident**

3                   Eschelon also requested relief as to the Rehabilitation Center example specifically  
4                   (e.g., \$1,800)<sup>185</sup> and will address Qwest's arguments as to why that relief should be  
5                   denied.

6                   First, under the expedite process that the parties had followed since the beginning  
7                   of their interconnection agreement in Arizona, Eschelon's request for expedite of a loop  
8                   order for the Rehabilitation Center met the criteria for an emergency expedite. In  
9                   connection with its efforts to obtain an expedited DS1 capable loop necessary to restore  
10                  the Rehabilitation Center's service, Eschelon provided Qwest with a letter from the  
11                  customer indicating that the customer was an organization "serving children and adults  
12                  with severe developmental, physical and behavioral health needs" and further stating that  
13                  "Our disabled citizens are in jeopardy and could be at great risk without telephone service  
14                  to be able to communicate healthcare, urgent care and programmatic needs."<sup>186</sup> Eschelon  
15                  provided this information to Qwest,<sup>187</sup> consistent with the established procedures for  
16                  obtaining emergency expedites.<sup>188</sup> Under those procedures, the Rehabilitation Center

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<sup>185</sup> Complaint, Relief Requested, ¶J, page 14, lines 4-7: "An order, with respect to the Customer incident, requiring Qwest to refund Eschelon any over-charges and considering, in determining that amount, that if Qwest had applied the Emergency criteria that it applied to past loop orders under the ICA, Eschelon would have paid no additional charge because the Customer incident met those Emergency conditions."

<sup>186</sup> Staff Direct (Hrg. Ex. S-1) at Attachment 8.

<sup>187</sup> Staff Direct (Hrg. Ex. S-1) at Attachment 1, ¶18; B. Johnson Rebuttal (Hrg. Ex. E-2), p. 13, lines 9-10.

<sup>188</sup> Hrg. Ex. E-1 (Johnson Dir.), Attachment L; B. Johnson Rebuttal (Hrg. Ex. E-2), p. 13, lines 9-10. As discussed by Qwest's witness, Ms. Martain, Qwest's practice, when determining whether the conditions for an emergency expedite had been met, was not to second-guess the information provided by the CLEC:

Q. And what information did Qwest rely on in making the determination about whether the emergency conditions had been met?

A. The information provided by our CLECs.

Q. And did Qwest rely on any other information in making that determination?

A. It would have to be on the reasons that they provided to us, if I understand your question.

1 was eligible for an emergency expedite, either because the loss of service constituted a  
2 medical emergency (based on the medical needs of the clients served by the  
3 Rehabilitation Center), because lines to the individual client rooms were completely out  
4 of service and unable to access 911, or because the loss of service was the result of a  
5 disconnect in error.<sup>189</sup>

6 The evidence shows that the only reason given by Qwest at the time for its refusal  
7 to expedite service to the Rehabilitation Center was because Eschelon had not signed an  
8 "expedite amendment."<sup>190</sup> On this point, Ms. Novak, Eschelon's purported "advocate"

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Q. I think -- if I understand your answer, it's no. Did Qwest, other than information provided by CLECs, rely on any other information, any other sources of information, in order to determine whether the emergency conditions had been met?

A. The process states that we talk -- a CLEC calls in and we talk to them for the reason for the expedite. They would explain the situation with fire or flood or medical emergency, and based upon the information that we are provided, we would determine if it was eligible.

Q. Based on the information Qwest was provided by the CLEC?

A. True.

Q. And not any other source; true?

A. The process outlines.

Q. And that was the practice that Qwest followed; correct?

A. Correct.

Tr., p. 344, line 1 – p. 345, line 1 (testimony of J. Martain).

<sup>189</sup> Testimony by the Commission staff noted that "The customer's expedite order referenced in this Complaint definitely falls under the conditions where the end-user is completely out of service (primary line). Due to the nature of the customer, the order could also be classified as a medical emergency." Staff Direct (Hrg. Ex. S-1), p. 25, lines 23-25.

Although CLEC disconnects in error are not among the emergency criteria specifically enumerated in Qwest's PCAT, the evidence shows that it was Qwest's practice to provide expedites in order to restore service following a disconnect in error, whether the error was committed by Qwest or the CLEC. *See* Staff Direct (Hrg. Ex. S-1), p. 38, lines 8-9; Hrg. Ex. E-1 (Johnson Dir.), p. 9, lines 13-16; Hrg. Ex. E-1 (Johnson Dir.) at Attachment D (examples of loop expedite requests approved by Qwest include Eschelon disconnects in error); B. Johnson Rebuttal (Hrg. Ex. E-2), p. 16, line 4 – p. 17, line 11.

<sup>190</sup> Hrg. Ex. Q-5 (Novak Dir.), p. 8, lines 25-26 ("Qwest denied the request because Eschelon did not have an expedite amendment.").

1 within Qwest,<sup>191</sup> in a voicemail to Ronda Knudson at Eschelon confirming Qwest's  
2 refusal to expedite service to the Rehabilitation Center, stated at the time:

3 Hi Ronda, this is Jean, I have to deny the expedite. You *do not have an*  
4 *amendment* to pay for this expedite and *so* I cannot, *I have to turn it*  
5 *down*. If you would like me to have someone fax an amendment to you,  
6 um, we can get that signed by you and by Qwest to expedite this order  
7 and then all you would have to do is sup the order and put the appropriate  
8 CL for expedite. So let me know what you want to do. Ah, if you want  
9 an amendment, um, I will call Josh and have him get one for you.<sup>192</sup>

10 Note the absence of any reference to not meeting the emergency conditions. To the  
11 contrary, Ms. Seiwert of Qwest said she would "hate" to reject the request when it is for  
12 something "important."<sup>193</sup> She indicated there was no point to escalate internally at  
13 Qwest to the "VP" level, because Qwest would deny it anyway.<sup>194</sup> But, she offered to sit  
14 at her desk and continue to determine if there was anything she could do.<sup>195</sup> Ms. Novak  
15 said no, that she was "okay with not doing it" – not because she disagreed that it was  
16 important – but "because they need to sign an amendment."<sup>196</sup> No one ever suggested at

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<sup>191</sup> Tr. Vol. II, p. 427, lines 16-21 (testimony of J. Novak).

<sup>192</sup> B. Johnson Rebuttal (Hrg. Ex. E-2) at 14, fn. 43 (emphasis added). See also Tr. Vol. II, p. 451, lines 10-17 (testimony of J. Novak):

Q. Eschelon -- whether or not there was a medical emergency Eschelon could not get an expedited loop because the emergency expedite process was no longer available to it; correct?

A. Eschelon could not have an expedite on unbundled loop for the Rehabilitation Center because of the expedite process that became effective January 3, 2006 and Eschelon did not have an executed amendment.

As Qwest's counsel observed, "[T]here should have been no question when they asked for an expedite for the rehabilitation center that Qwest was going to say, no, we're not giving that to you. . . . And midday the next day, Qwest gets a request to expedite, and Qwest denies the request *because there's no amendment*." Tr., Vol. I, p. 175, lines 8-20 (opening statement by Qwest counsel) (emphasis added).

<sup>193</sup> Exhibit DD-6 (voice mail transcription), p. 1, to Hrg. Ex. E-4 (Denney Reb.). Ms. Siewert runs the Qwest Minneapolis service delivery center that manages escalations and disputes. See id. p. 1, FN 1.

<sup>194</sup> Exhibit DD-6 (voice mail transcription), p. 1, to Hrg. Ex. E-4 (Denney Reb.).

<sup>195</sup> Exhibit DD-6 (voice mail transcription), p. 1, to Hrg. Ex. E-4 (Denney Reb.).

<sup>196</sup> Exhibit DD-6 (voice mail transcription), p. 1, to Hrg. Ex. E-4 (Denney Reb.).

1 the time that the Rehabilitation Center did not qualify for an emergency expedite.<sup>197</sup>

2 Rather, Qwest's position was that the emergency expedite process was no longer  
3 available for loops and that, to expedite a loop order, Eschelon needed to amend its ICA  
4 with a \$200 per day rate.<sup>198</sup>

5 It was only long after the fact, after Eschelon brought its complaint in this docket,  
6 that Qwest began to claim that the loss of service to the Rehabilitation Center did not  
7 qualify for an emergency expedite.<sup>199</sup> Ms. Novak admits in her direct testimony that she  
8 performed research "after Eschelon complained."<sup>200</sup> In an attempt to justify its refusal to  
9 provide the requested expedite, Qwest took the extraordinary step of sending its lawyers  
10 to interview Eschelon's customer (without even notifying Eschelon at the time),<sup>201</sup> and  
11 relies on that alleged information to now claim that the Rehabilitation Center's loss of  
12 service did not present a medical emergency.<sup>202</sup> Eschelon was certainly entitled to rely  
13 on the information provided by its customers that its disabled clients were "in jeopardy  
14 and could be at great risk without telephone service to be able to communicate  
15 healthcare, urgent care and programmatic needs."<sup>203</sup> Indeed, this is the very information  
16 that Qwest itself would have relied on to determine the expedite request, but for Qwest's

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<sup>197</sup> J. Novak Rebuttal (Hrg. Ex. Q-6) at Exhibit JN-R3; Tr., p. 454, line 22 – p. 457, line 3 (testimony of J. Novak).

<sup>198</sup> B. Johnson Rebuttal (Hrg. Ex. E-2), p. 13, lines 11-13.

<sup>199</sup> J. Novak Direct (Hrg. Ex. Q-5), p. 13, line 16 – p. 14, line 1.

<sup>200</sup> B. Johnson Rebuttal (Hrg. Ex. E-2), p. 13, line 3 – p. 14, line 9.

<sup>201</sup> Per the ICA, Eschelon is the single point of contact with its End User Customers. See Att. 5, ¶6.2.2 ([CLEC] shall handle all interaction with [CLEC] Customers . . .). Particularly as Qwest admits it would have rejected the order anyway (as discussed above), this unnoticed Qwest interaction with Eschelon's customer was unnecessary.

<sup>202</sup> J. Novak Rebuttal (Hrg. Ex. Q-6) at Exhibit JN-R3; Tr., p. 454, line 22 – p. 457, line 3 (testimony of J. Novak).

<sup>203</sup> Staff Direct (Hrg. Ex. S-1) at Attachment 8; see also B. Johnson Rebuttal (Hrg. Ex. E-2), p. 14, line 11 – p. 15, line 2 ("Eschelon reasonably relied on the information available to it at the time, including the Customer's letter indicating that its disabled citizens were in jeopardy.").

1 decision that it would no longer provide Eschelon with expedited loops under the terms  
2 of its existing ICA.<sup>204</sup> Qwest's argument is contrary to its own practices with respect to  
3 the emergency conditions and how Qwest determined when to grant an expedite based on  
4 the emergency conditions.

5 Qwest's other three reasons are similarly without merit. Its second reason, that  
6 Eschelon could have called earlier, ignores the efforts Eschelon was making and also  
7 ignores that, for a time, Eschelon was unaware of the error.<sup>205</sup> Again, it would not have  
8 affected Qwest's response in any case. Qwest's third reason, that Eschelon should have

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<sup>204</sup> See Tr. Vol. II, p. 458, lines 7-17 (testimony of J. Novak):

Q. Then I will go back to my original question. Based on your experience, if you saw that kind of letter in connection with an expedite request, is that the kind of information that you would rely on to determine whether the emergency conditions had been met?

A. What I would do is I would take this letter and I would consult with my subject matter experts.

Q. And in such consultation would you rely on that letter?

A. I would share the letter with them to help a decision be made.

See also Tr. Vol. II, p. 344, lines 1-21 (testimony of J. Martain):

Q. And what information did Qwest rely on in making the determination about whether the emergency conditions had been met?

A. The information provided by our CLECs.

Q. And did Qwest rely on any other information in making that determination?

A. It would have to be on the reasons that they provided to us, if I understand your question.

Q. I think -- if I understand your answer, it's no. Did Qwest, other than information provided by CLECs, rely on any other information, any other sources of information, in order to determine whether the emergency conditions had been met?

A. The process states that we talk -- a CLEC calls in and we talk to them for the reason for the expedite. They would explain the situation with fire or flood or medical emergency, and based upon the information that we are provided, we would determine if it was eligible.

Q. Based on the information Qwest was provided by the CLEC?

A. True.

<sup>205</sup> Exhibit 1 to Staff's Testimony (Chronology); see, e.g. Complaint, ¶29, p. 10, lines 2-4.



1 checked a box on the order ignores Qwest's own PCAT that provides there are two  
2 options, with one including calling but not checking a box.<sup>206</sup>

3 Qwest's final reason is that this was a CLEC disconnect in error. Ms. Novak  
4 testified: "From a purely practical perspective, it seems incongruous for Eschelon to  
5 claim that it does not need to pay an expedite fee when a customer is disconnected due to  
6 an Eschelon error. . . . Eschelon should be thanking Qwest for helping them get the  
7 service restored."<sup>207</sup> Qwest did not, however, help Eschelon get the customer restored  
8 when requested or under the existing ICA. Ms. Novak is presumably referring to  
9 Qwest's later service restoral at the private line tariff rates (which Eschelon was forced to  
10 pay due to Qwest's rejection of the UNE loop order it should have processed).  
11 Eschelon's position is consistent with what was Qwest's practice, and Eschelon provided  
12 actual examples of previous expedites granted per that mutually agreeable practice.<sup>208</sup>  
13 Regarding such disconnects in error, the end user customer should come first.

14 As discussed above, Eschelon did *not* request an emergency-based expedite in the  
15 rehabilitation center example for a disconnect in error that did not meet any other  
16 condition. Eschelon is not asking for emergency-based expedites at no additional charge  
17 when the CLEC disconnects in error and no other condition is met. Covad (largely a  
18 DSL provider), when explaining its change request for an enhancement to the expedite  
19 process to add expedites for a fee, provided an example of a "migration to a new ISP

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<sup>206</sup> See, e.g., Attachment A-1 at Document No. 000017 (V8.0), Attachment A-3 at Document No. 00070 (V22.0) & Attachment E at Document No. 001646 (V40.0). The Qwest PCAT language providing the two options is quoted on page 9 of Ms. Johnson's Direct Testimony (Hrg. Ex. E-1). Qwest's retail customers call for expedites. Hrg. Ex. Q-3 (Martain Dir.), p. 39, lines 3-4.

<sup>207</sup> Hrg. Ex. Q-5 (Novak Dir.), p. 14, lines 6-12.

<sup>208</sup> Tr. Vol. 1, p. 95, lines 15-25 (Johnson). See Hrg. Ex. E-1, Att. D, at 000444-000445 (containing examples of CLEC disconnect in errors where Qwest in fact granted the expedite requests for loop orders).

1 provider” that “isn’t as critical” as a medical emergency.<sup>209</sup> When a critical condition *is*  
2 *met* and resources are available, the expedite should be granted at no additional charge –  
3 regardless of which carrier caused the disconnect in error.

4 **C. The Commission Should Reject Qwest’s Claim that Denying Expedites to**  
5 **CLECs for Loops is Not Discriminatory Because Expedites are a Superior**  
6 **Service**

7 In Qwest’s pre-filed testimony, Ms. Albersheim testified that it “is important to  
8 recognize that the *Staff is correct that expediting an order for a CLEC provides a*  
9 *superior service* to the CLEC.”<sup>210</sup> This statement suggested that Qwest had leapt to the  
10 conclusion that Staff agreed with Qwest that providing expedites to CLECs is superior  
11 service and, therefore, not providing expedites to CLECs is not discriminatory. At the  
12 hearing, Ms. Albersheim admitted her testimony on this point was inaccurate.<sup>211</sup>

13 The suggestion in Qwest’s pre-filed testimony seems to be at the heart of some of  
14 the misconceptions about the claims of discrimination in this case. Eschelon alleged  
15 discrimination as one of the bases for (1) finding that CLECs are entitled to receive  
16 expedites for unbundled loops, and (2) requiring Qwest to provide them at  
17 nondiscriminatory, cost-based rates including, when applicable outage and Emergency  
18 conditions exist, at no additional charge.<sup>212</sup> The Staff recommends finding that CLECs  
19 are entitled to receive expedites for unbundled loops,<sup>213</sup> and that Qwest should be

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<sup>209</sup> Hrg. Ex. Q-4 at JM-R1, p. 7 of 9, 2/27/04 CMP Clarification Call minutes.

<sup>210</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 4, lines 3-4 (emphasis added) (with no citation to Staff Testimony).  
*See also id.*, p. 17, lines 11-12 (“These conclusions raised by Staff establish, in and of themselves, that  
Eschelon seeks a superior service from Qwest.”).

<sup>211</sup> Tr. Vol. II, p. 221, lines 10-11.

<sup>212</sup> See, e.g., Complaint, p. 1, lines 13-14 & 19-21, ¶16, p. 7, lines 8-16, ¶21, p. 8, lines 31-20, ¶38, pp. 11-12.

<sup>213</sup> Hrg. Ex. S-1, Staff Conclusions #1 & #2, #6, & #7, Staff Executive Summary.

1 required to develop a cost-based rate for expedites in Phase III<sup>214</sup> and to provide  
2 expedites, when applicable outage and Emergency conditions exist, at no additional  
3 charge.<sup>215</sup>

4 In contrast, Qwest argues that it has no legal obligation to provide expedites to  
5 CLECs because expedites are a superior service and so it is not discriminatory to deny  
6 expedites to CLECs.<sup>216</sup> Therefore, per Qwest, it is offering expedites to CLECs for a  
7 retail rate not due to any legal requirement but to be a “Good Samaritan.”<sup>217</sup> If Staff  
8 agreed, its recommendations would have more likely said that Qwest has no obligation to  
9 provide expedites, and Staff surely would not have recommended requiring Qwest to  
10 develop a cost-based rate in a Commission proceeding for something that Qwest was not  
11 legally offering to provide. Qwest admits, however, that if a service were actually  
12 superior, it would be “inappropriate to consider the rates . . . in a cost docket.”<sup>218</sup> As  
13 Staff suggests requiring rates be established in a cost docket, Staff’s recommendations  
14 cannot be read in the manner erroneously suggested in Qwest’s pre-filed testimony.

15 Staff’s conclusions in its Executive Summary are consistent with the legal  
16 requirement for Qwest to provide access to UNEs on terms and conditions that are just,  
17 reasonable, and nondiscriminatory.<sup>219</sup> While Staff Conclusion No. 1 finds a breach of

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<sup>214</sup> Tr. Vol. I, p. 155, lines 20-23. (Staff Cross of Denney); Hrg. Ex. S-1, Staff Conclusion #7, Staff Executive Summary.

<sup>215</sup> Hrg. Ex. S-1, Staff Conclusion #1, Staff Executive Summary.

<sup>216</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 15, line 1.

<sup>217</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 15, lines 4-6.

<sup>218</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 15, lines 20-24.

<sup>219</sup> Section 251(c)(3) of the Federal Act. See also CFR §51.307(a) (requiring access to UNEs on “on terms and conditions that are just, reasonable, and nondiscriminatory”); §51.313 (“Just, reasonable, and nondiscriminatory terms and conditions” for the provision of UNEs); §51.303 (“General Pricing Standard”); *Id.* (a) (“rates, terms, and conditions that are just, reasonable, and nondiscriminatory”); *Id.* (b)(1) (established by the state commission “Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§51.505 and 51.511). See Hrg. Ex. E-3 (Webber/Denney Dir.), pp. 26-28.

1 contract, the Staff does not limit its recommendations to breach of contract grounds, as its  
2 conclusion regarding cost-based rates shows. Expedites in emergencies for unbundled  
3 loop orders at no additional charge may be required on both breach of contract grounds  
4 (because Qwest provided them using mutually developed procedures per the ICA for  
5 years before unilaterally changing those terms) and per the requirement to provide UNEs  
6 on nondiscriminatory terms and conditions (because Qwest provides them at no  
7 additional charge only when resources are available and it does not incur additional costs  
8 that are not already recovered in existing rates, as discussed below). Expedites for a fee  
9 for unbundled loop orders, when the emergency-based conditions are not met, may be  
10 required on both breach of contract grounds (because, before Versions 27 and 30,  
11 procedures were mutually developed to allow CLECs to obtain expedites for a fee,  
12 including expedites for all types of loops) and on nondiscrimination grounds (because  
13 Qwest admits it provides expedited service for a fee to its retail design customers and  
14 thus should provide expedited service for a fee to its CLEC design customers as well).

15 Qwest would disagree and ask this Commission to set the price based on a  
16 distinction between design and non-design services (finding expedites are available for a  
17 fee for design, and expedites for no additional charge apply to non-design/POTS).  
18 Regardless of the product (design or non-design), however, Qwest now admits that it  
19 provides expedites in emergency situations to all of its retail customers, and it is  
20 appropriate to provide them in emergencies to CLEC and retail customers alike.<sup>220</sup> The  
21 question becomes at what rate. Qwest argues that, in emergencies, the additional  
22 expedite charge should be zero for CLEC POTS customers, because Qwest Retail POTS

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<sup>220</sup> Tr. Vol. III, p. 520, lines 3-13 (Million).

1 customers pay zero; and it should be \$200 per day for CLEC design customers, because  
2 Qwest retail design customers pay \$200 per day. In other words, whichever way one  
3 looks at it, Qwest is arguing that nondiscrimination means *the same price*.<sup>221</sup> As  
4 discussed in the next section, however, it is incorrect to equate not providing a wholesale  
5 service *at the same price* as a retail service with superior service.<sup>222</sup>

6 ***The end result is that it is undisputed that Qwest provides expedites to itself and***  
7 ***its retail customers, including expedites in emergency situations, though in some cases***  
8 ***Qwest charges for them and in some it does not.***<sup>223</sup> There isn't any genuine question,  
9 therefore, that Eschelon is entitled to expedites for unbundled loops, as the undisputed  
10 evidence shows Qwest provides expedites for design services to its retail customers.  
11 Staff's recommendations in its Executive Summary are consistent with this evidence and,  
12 as to what rate applies, the Staff suggested review in Phase III of the cost docket.<sup>224</sup>  
13 Eschelon makes additional recommendations, based on Commission-approved rates, for  
14 application in the meantime so that CLECs do not have to pay the excessive "market"  
15 based rate until then (see the next section and the Executive Summary to this Brief<sup>225</sup>).  
16 Eschelon's request that the Commission apply the Commission-approved ICB rate using

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<sup>221</sup> See Hrg. Ex. Q-1 (Albersheim Dir.), p. 12, line 2. See *id.* p. 12, line 4 ("This is the essence of non-discrimination."); Hrg. Ex. Q-3 (Martain Dir.), p. 41, lines 14-18.

<sup>222</sup> Hrg. Ex. E-4 (Denney Reb.), p. 51.

<sup>223</sup> See, e.g., Tr. Vol. 1, p. 199, lines 2-4 (Albersheim) (Qwest provides expedites to its retail customers as a regular part of its business); Vol. III, p. 520, lines 3-13 (Million). Regarding exceptions to charging for retail design customers, see Hrg. Ex. Q-3 (Martain Dir.), p. 40, lines 4-10.

<sup>224</sup> Tr. Vol. I, p. 155, lines 20-23. (Staff Cross of Denney); Hrg. Ex. S-1, Staff Conclusion #7, Staff Executive Summary.

<sup>225</sup> See also Row Nos. 36 & 37 to Exhibit 5 to this Brief.

1 Commission-approved rates and cost principles is consistent with the Staff  
2 recommendations in the earlier 271 case.<sup>226</sup>

3 So where does the Staff's statement regarding not supporting a finding of  
4 discrimination<sup>227</sup> come in? Staff concludes that:<sup>228</sup>

5 [T]here are no current requirements in the Qwest Performance Assurance Plan  
6 that specifically address the expedite process. Therefore, there are no  
7 performance measurements or benchmarks. The Qwest Performance Assurance  
8 Plan ("PAP") incorporates performance measurements that ensure Qwest's

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<sup>226</sup> See Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) at ¶105 ("In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates. However, even for rates included in an interconnection agreement, many agreements provide that they shall be superseded by any Commission approved rates in a generic costing docket. If Eschelon disputes whether Qwest is applying any charge correctly, it has the right to raise the issue with the Commission."); *Id.* ¶ 108 ("To the extent unapproved rates are contained in Qwest's SGAT, Staff believes that they should be considered interim and subject to true up once the Commission approves final rates. However, Staff does not believe that there should be any rates in the SGAT that Qwest has not separately filed with the Commission, along with cost support, for prior review and approval. To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a particular case through a negotiated interconnection agreement, could be a great impediment to competition."); *Id.* ¶123 ("... If there are no rates agreed to in an interconnection agreement for certain services, then the SGAT, which contains Commission approved rates, should be utilized."). The SGAT contains a Commission-approved rate for expedites. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as "ICB" with a reference to footnote 5).

<sup>227</sup> Hrg. Ex. S-1 (Staff Testimony), p. 32, line 19 – p. 33, line 10.

<sup>228</sup> Staff said it concluded there is no "retail analogue" for unbundled loops. Hrg. Ex. S-1 (Staff Testimony), p. 32, lines 21-23. Qwest's position has vacillated on this topic, but Qwest now claims: "Commission has already determined that that DS1 Capable Loops and DS3 Capable Loops have a retail analogue; specifically, DS1 and DS3 private lines, respectively." Hrg. Ex. Q-1 (Albersheim Dir.), p. 12, lines 18-21. Ms. Albersheim goes on to observe: "Just as with Eschelon, Qwest's retail customers often use these private lines to provide multiple voice lines within an office. Thus, Eschelon and Qwest use these comparable facilities to perform the exact same function." *Id.* lines 20-22. Qwest admits it provides expedites to its retail private line customers. Although Qwest asserts that DS0 loops have no retail analogue, in CMP, Qwest said it performs expedites for both its "Retail" and "Access" customers. (See Qwest Version 11 CMP Response, Att. A-2 at 000062, #3, to Hrg. Ex. E-1, Johnson Dir.). In any event, per Qwest, whether a retail analogue exists is *not* the basis for Qwest's position; rather it is based on the distinction between design and non-design services. See Hrg. Ex. Q-1, Albersheim Dir., p. 3, lines 13-17. Qwest says DS0 loops are design services, just as private lines are design services. Therefore, Qwest admits the availability of expedites for design services and the issue then becomes the appropriate wholesale rate (and whether, in some circumstances such as emergencies, there may be no additional charge for unbundled loop expedites). The rate is discussed in the next section. (See also Row Nos. 36 & 37 to Exhibit 5 to this Brief.) Regarding the test applied by the FCC (which is no less rigorous when there is no retail analogue than when there is one), see Row 34 and accompanying footnotes in Exhibit 5 to this Brief.

1 service performance to competitors can be measured and monitored so that any  
2 degradation of the agreed upon level of service is detected and corrected.  
3 Performance measurements were developed in the 271 collaborative workshops.  
4 Each of the measurements have been given a precise definition, called a  
5 Performance Indicator Definition (“PID”), that includes specification of the unit  
6 of measure, the data to be utilized in the measurement, and the standard. The  
7 standard may be a parity comparison of CLEC service performance with the  
8 Qwest retail analogue. When no retail analogue exists the standard is a  
9 benchmark.<sup>229</sup>

10 Staff recommends that a “performance measurement for expedites of Unbundled Loops  
11 be developed through CMP.”<sup>230</sup> Without the kind of data and analysis described by Staff,  
12 there is no PID to measure performance over time or from which to conclude whether  
13 there is a pattern and practice of discrimination. If a PID is developed for expedites per  
14 the Staff’s recommendation, that kind of determination could then be made.

15 In the meantime, per Eschelon’s discrimination claim, Eschelon seeks to obtain  
16 expedites for unbundled loops, just as Qwest retail customers obtain them for design  
17 services, and to obtain them on just, reasonable, and *nondiscriminatory* terms – which  
18 does *not* mean the same price as retail. Although Qwest takes the position that private  
19 line service is the retail analogue of an unbundled DS1 Capable Loop,<sup>231</sup> Qwest  
20 presumably would not claim that it is appropriate to charge the same price for the  
21 unbundled loop as for the retail service.<sup>232</sup> In any event, the Commission has approved a  
22 lower wholesale rate for the unbundled loop than the higher retail rate for private line.  
23 The same is true for other wholesale rates that this Commission has set for UNEs. Resale

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<sup>229</sup> Hrg. Ex. S-1 (Staff Testimony), p. 32, line 23 – p. 33, line 10.

<sup>230</sup> Hrg. Ex. S-1, Staff Conclusion #7, Staff Executive Summary.

<sup>231</sup> Hrg. Ex. Q-1, Albersheim Dir., p. 12, lines 18-20.

<sup>232</sup> Cf. Hrg. Ex. E-1 (Albersheim Dir.), p. 12, lines 1-4.

1 is also provided not at retail rates, but at a wholesale discount.<sup>233</sup> Qwest does not perform  
2 the end user retail functions for a wholesale service.

3 Likewise, the wholesale rate for expedites should be lower than the retail rate for  
4 expedites.<sup>234</sup> The requirement that Qwest provide access to UNEs on nondiscriminatory  
5 terms means providing CLECs with the same level of access as Qwest provides to its  
6 retail customers, not at retail rates, but cost-based rates.<sup>235</sup> At the hearing in the  
7 Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there is a  
8 difference in price between two services does not mean that the lower priced service is a  
9 superior service for purposes of determining whether that service is a UNE.<sup>236</sup>

10 **D. The Public Interest is Served by Making Expedites Available at Cost-Based**  
11 **Rates to all CLECs**

12 In its Complaint, Eschelon also asserted that Qwest's conduct is not in the public  
13 interest and violates public policy.<sup>237</sup> If the Commission finds that Qwest's conduct in  
14 implementing and enforcing the changes described in the Complaint violated the public

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<sup>233</sup> See, e.g., ICA Att. 1, ¶2.6.

<sup>234</sup> Qwest has acknowledged that expediting service does not require any additional provisioning activities; it merely involves performing the same provisioning activities more quickly than would otherwise be the case. Exhibit MS-6, MN ICA Arbitration Transcript, Vol. II, p. 97, line 18 - p. 98, line 22 (quoted at Hrg. Ex. E-4, Denney Reb., pp. 59-60). See also Complaint, ¶38, p. 12, lines 1-3 ["Qwest recovered its costs through the Commission approved charges, because with an expedite Qwest performs the same work (as the work included in the standard charge), but Qwest just performs that work earlier."].

<sup>235</sup> Hearing Ex. E-4 (Denney Reb.), p. 45, line 7 - p. 46, line 9.

<sup>236</sup> *In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996*, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1, p. 26, lines 14-18, cited in Hrg. Ex. E-4, Denney Reb., p. 51, FN 162.

<sup>237</sup> See, e.g., Complaint, ¶21, p. 8, lines 18-20 (citing A.R.S. §40-334); ¶F, p. 13, line 22.



1 interest, as alleged by Eschelon in its Complaint, Qwest could not continue the conduct as  
2 to any CLEC.<sup>238</sup>

3 Qwest argues that Eschelon is somehow trying to gain an unfair advantage over  
4 other CLECs that have signed an amendment providing for a \$200 per day expedite  
5 charge.<sup>239</sup> Staff's recommendations, however, because they provides that expedites  
6 should be available to other CLECs and at cost-based rates (consistent with the relief  
7 requested in Eschelon's Complaint<sup>240</sup>), offers no such unfair advantage. This is because  
8 all CLECs will have an opportunity to receive a cost-based rate.

9 Ms. Albersheim testifies: "And finally, forcing withdrawal of ICA amendments,  
10 as recommended by Staff, would violate the plain language of Section 251(a)(1) of  
11 Telecommunications Act."<sup>241</sup> This claim is incongruous coming from Qwest, which has  
12 used its rejection of orders without prior Commission approval of its rate to force  
13 amendments with an unapproved rate upon CLECs. The Commission has the authority to  
14 order remedial action to address conduct that violates public policy. In any event, there is  
15 no need to require withdrawal of ICA amendments to make expedites available at cost-  
16 based rates to all CLECs. Qwest uses contract amendments to increase rates; it can use  
17 them to decrease rates as well. Staff's Conclusion No. 2 in its Executive Summary refers  
18 to offering an "option" to all CLECs. This option can be in the form of an amendment  
19 (which Qwest should provide to CLECs by notice and post it on its website, as it does

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<sup>238</sup> See Complaint, ¶42, p. 13, lines 1-3: Conduct that violates the public interest "denies Eschelon *and other CLECs* a meaningful opportunity to complete."

<sup>239</sup> Tr. Vol. I, p. 178, line 23 – p. 199, line 4 (Mr. Steese opening).

<sup>240</sup> See Exhibit 4 to this Brief.

<sup>241</sup> Hrg. Ex. Q-2 (Albersheim Reb.), p. 18, lines 8-9.

1 with other ICA language it makes available, so that CLECs are aware of the option). If a  
2 CLEC elects to amend its ICA, it may avail itself of the option.

3 Staff's recommendations in its Executive Summary are in the public interest.

4 **E. The ICA Does Not Permit Qwest to Unilaterally Impose a Non-Cost Based**  
5 **Charge on Eschelon For a Service that Qwest Provides to Itself and Its Retail**  
6 **Customers.**

7 In the Qwest 271 case, the Commission said that Qwest should not unilaterally  
8 charge CLECs rates before Qwest has separately filed cost support for prior review and  
9 approval.<sup>242</sup> Specifically, the Commission, in adopting Staff recommendations, said:  
10 "To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a  
11 particular case through a negotiated interconnection agreement, could be a great  
12 impediment to competition."<sup>243</sup> For one of the issues in that case, Qwest also attempted  
13 to use its actions in CMP as a defense to CLEC concerns that a Qwest CMP PCAT  
14 change resulted in the imposition of charges. The Staff said it "is extremely concerned  
15 that Qwest would implement such a significant change through its CMP process without  
16 prior Commission approval."<sup>244</sup>

17 The Commission has approved an ICB rate for expedites.<sup>245</sup> The expedite rate is  
18 still listed as ICB in the Qwest Arizona SGAT,<sup>246</sup> and Qwest was required to bring

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<sup>242</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶108, lines 18-19. The 271 case went on for approximately four years in Arizona, and Mr. Steese, who participated in the Qwest-Eschelon 271 workshop, was "very involved" in the 271 case and had "intimate familiarity" with it. See Transcript of July 27, 2006 Procedural Conference in this matter, p. 28, lines 8-22.

<sup>243</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶108, lines 19-21.

<sup>244</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest's 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶109, lines 22-23, cited in Complaint, p. 6 at footnote 1.

<sup>245</sup> *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. Expedite charges are subject to this order, because Qwest "offered in this docket on an ICB price basis" the

1 changes to the SGAT to the Commission before unilaterally implementing them.<sup>247</sup>  
2 Qwest has not sought Commission approval to change that wholesale rate before  
3 implementing a retail rate for wholesale customers. When Qwest previously  
4 The ICA provides that “expedite charges may apply.”<sup>248</sup> Qwest acknowledges  
5 that this language enables it to assess a separate charge to expedite a loop order.<sup>249</sup>  
6 Qwest also acknowledges that the ICA does not provide expedite charges “will” apply  
7 and that they may not apply.<sup>250</sup> As to when charges may and may not apply, and as to the  
8 amount of the charge, the ICA provides broadly that charges must be in accordance with  
9 the law, including Commission rules and regulations.<sup>251</sup> Federal law provides access to

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provision of expedites. *See id.*; *In the Matter of Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, ACC Docket No. T-00000A-00-0194 Phase II (“Phase II UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, March 15, 2001, p. 1. *See also* Exhibit DD-4 to Hrg. Ex. E-4 (Denney Reb.); Hrg. Ex. E-4, Denney Reb., p. 40, line 7 – p. 42, line 6.

<sup>246</sup> See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5).

<sup>247</sup> See 271 Opinion and Order, Arizona Decision No. 66201 in ACC Docket No. T-00000A-97-0238, p. 28 (“It is further ordered that Qwest Corporation’s SGAT, as modified from time to time after Commission approval, **shall remain available**, as the standard interconnection agreement, **until the Commission authorizes otherwise.**”) (emphasis added). *See also* Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) at ¶¶ 105-106 & 108. Despite this order and without prior Commission approval, Qwest unilaterally announced in a Level 1 CMP notice (effective immediately) that the SGAT (which includes the ICB expedite rate – *see* previous footnote) is no longer available for opt-in. *See* Hrg. Ex. E-7.

<sup>248</sup> ICA, Attachment 5 (Hrg. Ex. E-8), Sections 3.2.4.2.1, 3.2.4.3.1, 3.2.4.4.

<sup>249</sup> Tr. Vol. II, p. 229, line 18 – p. 230, line 19 (Albersheim).

<sup>250</sup> Tr. Vol. II, p. 229, line 19 – p. 230, line 4 (Albersheim).

<sup>251</sup> ICA, Att. 1, ¶1.1, Exhibit 2 to this Brief. In addition to the Commission’s cost orders (see, e.g. the next footnote below), the Commission has made rulings regarding the SGAT. *See* 271 Opinion and Order, Arizona Decision No. 66201 in ACC Docket No. T-00000A-97-0238, p. 28 (“It is further ordered that Qwest Corporation’s SGAT, as modified from time to time after Commission approval, **shall remain available**, as the standard interconnection agreement, **until the Commission authorizes otherwise.**”) (emphasis added). Despite this order and without prior Commission approval, Qwest unilaterally announced in a Level 1 CMP notice (effective immediately) that the SGAT is no longer available for opt-in. *See* Hrg. Ex. E-7. The SGAT includes the ICB expedite rate. *See* Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB,” with a reference to footnote 5 referring to the cost docket). In Qwest’s offering for CLEC ICA negotiations, (Qwest’s “template”), Qwest lists its \$200 per day expedite charge. *See* Hrg. Ex. E-2 (Johnson Reb.), BJJ-B, at Q000013, Ex. A §9.20.14.1.

1 UNEs must be provided on terms and conditions that are just, reasonable, and  
2 nondiscriminatory.<sup>252</sup> This Commission has approved an Individual Case Basis (“ICB”)  
3 rate for expedites until a rate for expedites is developed in Phase III of the cost docket.<sup>253</sup>

4 The cost testimony in this case serves several purposes. At a minimum, it shows  
5 that Qwest’s proposed rate of \$200 per day expedited – which Qwest does not even  
6 attempt to claim is cost based – is excessive and inconsistent with the Commission’s cost  
7 order regarding expedites. Mr. Denney provided several points of comparison to show  
8 the excessiveness of Qwest’s proposed rate.<sup>254</sup> It also shows that there may be  
9 circumstances when no additional charge is warranted based on costs, such as when  
10 Qwest has not shown costs are not already recovered in existing rates. And, it shows that  
11 not only is it not discriminatory to not charge a retail rate to wholesale customers, but  
12 also that it violates sound cost principles and nondiscrimination requirements to do so.  
13 Without repeating all of the testimony about costs here, Eschelon will summarize three  
14 points: (1) the purpose of the amendment is to impose a fee to replace the Commission  
15 approved ICB rate without first obtaining a new approved rate from the Commission,  
16 even though Qwest claimed its purpose was to confirm Eschelon’s willingness to pay; (2)

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<sup>252</sup> Section 251(c)(3) of the Federal Act. See also §51.307(a) (requiring access to UNEs on “on terms and conditions that are just, reasonable, and nondiscriminatory”); §51.313 (“Just, reasonable, and nondiscriminatory terms and conditions” for the provision of UNEs); §51.303 (“General Pricing Standard”); *Id.* (a) (“rates, terms, and conditions that are just, reasonable, and nondiscriminatory”); *Id.* (b)(1) (established by the state commission pursuant to the forward-looking economic cost-based pricing methodology set forth in §§51.505 and 51.511). See Hrg. Ex. E-3 (Webber/Denney Dir.), pp. 26-28.

<sup>253</sup> *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. Expedite charges are subject to this order, because Qwest “offered in this docket on an ICB price basis” the provision of expedites. See *id.*; *In the Matter of Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, ACC Docket No. T-00000A-00-0194 Phase II (“Phase II UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, March 15, 2001, p. 1. See also Exhibit DD-4 to Hrg. Ex. E-4 (Denney Reb.).

<sup>254</sup> See Hrg. Ex. E-4 (Denney Reb.), pp. 58-62.

1 Finding there is no additional charge for emergency-based expedites is consistent with  
2 cost-based rates; (3) Qwest has an obligation to provide nondiscriminatory expedited  
3 service; and (4) It is not discriminatory to have a separate (and different) rate for a  
4 wholesale and retail.

5 **1. The Purpose of the Qwest Amendment is to Impose an Unapproved**  
6 **Fee and Circumvent Commission Approval of Rates**

7 Ms. Albersheim asserted that the purpose of the ICA amendment was to  
8 “confirm”<sup>255</sup> Eschelon’s willingness to pay for expedites. Until a rate is established in a  
9 different docket, Eschelon has clearly expressed its willingness to pay a separate and  
10 distinct expedite charge.<sup>256</sup> It laid those charges out in writing for Qwest.<sup>257</sup> Contrary to  
11 Qwest’s claim that Eschelon is unclear about whether it will pay if the costs are already  
12 recovered in existing rates,<sup>258</sup> Eschelon explicitly said that in the interim it will pay a  
13 separate charge – even when it leads to double recovery because the separate charge is  
14 also included in the installation NRC.<sup>259</sup> *The difference* is that Eschelon asserts that the  
15 separate expedite interim charge should be determined using TELRIC cost principles and  
16 *Commission-approved rates* for those activities, whereas Qwest has implemented an  
17 excessive, *unapproved “market” based rate*. No amendment is needed, as the existing

<sup>255</sup> Tr. Vol. II, p. 273, lines 5-11 and p. 293, lines 17-22 (Albersheim).

<sup>256</sup> Qwest is well aware of this fact. See, e.g., Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) at ¶106 (“Eschelon clarifies that it does not object to the application of Commission approved rates.”).

<sup>257</sup> See Hrg. Ex. E-1, A-7, at 000137-000139 (Eschelon letter indicating that “whenever Eschelon requests an expedite for an unbundled loop order and Qwest grants the request,” Eschelon will pay the Commission-approved rates for the work and activities to perform the expedite. The Commission has approved proceeding on an Individual Case Basis (ICB). Hrg. Ex. E-4 (Denney Reb.), p. 40, line 7 – p. 42, line 6. The approach identified by Eschelon in its letter is how ICB pricing should work.

<sup>258</sup> Tr. Vol. II, p. 296, lines 14-19 (Mr. Steese objection).

<sup>259</sup> See Hrg. Ex. E-1, A-7, at 000138, offering to pay a dispatch charge and stating: “When the dispatch cost is included in the installation charge, this is double recovery by Qwest.” Even though costs for labor to expedite may already be included in the installation charge for re-installing service, Eschelon offered to both pay that installation charge and to pay the half hourly rate for time due to the expedite itself. See *id.*

1 ICA allows Qwest to charge Commission-approved rates, including the expedite  
2 charge.<sup>260</sup> Qwest admits that the “current agreement allows for charges.”<sup>261</sup> Therefore,  
3 the purpose of the Qwest amendment is not to establish an ability to charge or to confirm  
4 Eschelon’s willingness to pay.

5 The true purpose of the amendment came out clearly at the hearing. Mr. Steese  
6 said:

7 But what did change management do with Versions 27 and 30? Qwest told the  
8 CLEC community uniformly, if you don't agree to pay a certain fee, \$200 per day  
9 per expedite, we're going to reject the order.<sup>262</sup>

10 Ms. Albersheim said:

11 The change at issue here is the *imposition of the fee* to expedite orders for design  
12 services.<sup>263</sup>

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<sup>260</sup> When Commission-approved rates do not appear in the ICA, Qwest charges them pursuant to the Rates and Charges General Principle that charges must be in accordance with Commission rules and regulations. See ICA, Att. 1, ¶1.1, Exhibit 2 to this Brief. See Tr. Vol. I, p. 138 (Denney), lines 22-24; Hrg. Ex. E-3 (Webber/Denney Dir.), p. 41 at footnote 44. See also Hrg. Ex. #4 (Denney Reb.), DD-8, p. 5 (last full paragraph) (explaining application of Commission-approved rates from UNE cost cases and pointing out the difference between properly applying Commission-approved rates versus unilaterally imposing unapproved rates). See also Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) at ¶105 (“In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates. However, even for rates included in an interconnection agreement, many agreements provide that they shall be superseded by any Commission approved rates in a generic costing docket. If Eschelon disputes whether Qwest is applying any charge correctly, it has the right to raise the issue with the Commission.”); *Id.* ¶ 108 (“To the extent unapproved rates are contained in Qwest’s SGAT, Staff believes that they should be considered interim and subject to true up once the Commission approves final rates. However, Staff does not believe that there should be any rates in the SGAT that Qwest has not separately filed with the Commission, along with cost support, for prior review and approval. To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a particular case through a negotiated interconnection agreement, could be a great impediment to competition.”); *Id.* ¶123 (“... If there are no rates agreed to in an interconnection agreement for certain services, then the SGAT, which contains Commission approved rates, should be utilized.”). The SGAT contains a Commission-approved rate for expedites. See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5).

<sup>261</sup> Tr. Vol. II, p. 273, lines 9-10.

<sup>262</sup> Tr. Vol. I, p. 168, line 23 – p. 169, line 2 (Mr. Steese opening).

1 The problem is that Qwest used CMP as a vehicle to establish a fee for wholesale  
2 services. It then rejected orders in an attempt to extract an amendment, instead of  
3 seeking prior Commission approval. If Qwest wished to begin charging for expedites  
4 that it had previously provided without additional charge, the remedy provided for under  
5 the contract was to pursue dispute resolution<sup>264</sup> or to petition the Commission for  
6 arbitration,<sup>265</sup> not to withhold service that the contract requires Qwest to provide. As  
7 Commission staff observed regarding the Rehabilitation Center example: "Qwest should  
8 have expedited the request first and then followed up afterwards with the dispute  
9 resolution process. Clearly, [Named Customer] should have been thought of first;  
10 especially given the nature of the customer's business."<sup>266</sup>

11 **2. A Finding that There is No Additional Charge for Emergency-Based**  
12 **Expedites is Consistent with Cost-Based Rates.**

13 In some cases, applying an ICB rate, there would be no additional charge (over  
14 and above the installation charge) for the expedite, because Qwest does not incur  
15 additional costs that are not already recovered. This is the case with emergency  
16 situations. As discussed above, Qwest provides emergency-based expedites (for no  
17 additional charge) only when resources are available and, if no resources are available,  
18 Qwest rejects the order. Therefore, Qwest incurs no cost to add resources.<sup>267</sup> An ICB  
19 rate would result in a charge if the CLEC is then willing to pay an additional charge to

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<sup>263</sup> Tr. Vol. I, p. 191, lines 16-17 (Albersheim) (emphasis added).

<sup>264</sup> ICA, Attachment 1, Section 1.2; Tr. Vol. II, p. 242, line 9 – p. 243, line 1 (Albersheim).

<sup>265</sup> ICA, Part A, Section 27.1, Staff Direct (Hrg. Ex. S-1), p. 34, lines 14-19.

<sup>266</sup> Staff Direct (Hrg. Ex. S-1), p. 34, lines 19-21 *see also* Staff Direct (Hrg. Ex. S-1), p. 36, line 22 – p. 37, line 2 ("But since CLEC Interconnection Agreements are voluntarily negotiated or arbitrated, an alternative Qwest may have chosen, rather than trying to force Eschelon into signing an amendment, could have been to take the issue to arbitration under the terms of the Qwest-Eschelon Interconnection Agreement.")

<sup>267</sup> Hrg. Ex. E-4, Denney Reb., p. 39.

1 make resources available and Qwest makes them available for the purpose of providing  
2 the expedite.

3 That Qwest provided emergency expedites without assessing a separate charge  
4 does not mean that Eschelon was getting expedites “for free.” Costs may be recovered  
5 through an explicit rate or implicitly, through cost factors that are used to develop another  
6 rate.<sup>268</sup> In order to recover a separate charge for an activity, Qwest must first show that  
7 the cost of performing that activity is not already recovered in an existing rate.<sup>269</sup> Where  
8 there is an existing process for which there is no explicit charge, as there was for  
9 emergency expedites, it is reasonable to assume that costs associated with that process are  
10 already included in cost factors.<sup>270</sup> The burden is on Qwest to show otherwise if it wishes  
11 to recover a separate charge in addition to the approved installation charge.

12 **3. Expedited service is a means by which Eschelon obtains access to**  
13 **UNEs.**

14 The federal Act requires Qwest to provide “nondiscriminatory access to network  
15 elements on an unbundled basis at any technically feasible point on rates, terms, and  
16 conditions that are just, reasonable, and nondiscriminatory.”<sup>271</sup> “Access” to an unbundled  
17 network element concerns the manner in which the element is provisioned.<sup>272</sup> The

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<sup>268</sup> Tr. Vol. I, p. 141, line 24 – p. 142, line 7 (testimony of D. Denney).

<sup>269</sup> Hearing Exhibit E-5 (transcript excerpts from Arizona arbitration hearing between Eschelon and Qwest) at p. 200, lines 16-20; Hearing Exhibit E-6 (transcript excerpts from Washington arbitration hearing between Eschelon and Qwest), p. 193, line 23 – p. 194, line 2.

<sup>270</sup> Tr. Vol. I, p. 142, lines 5-10 (testimony of D. Denney).

<sup>271</sup> 47 U.S.C. §251(c)(3).

<sup>272</sup> See First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996) (“*First Report and Order*”) at ¶ 268 (“We conclude that we should adopt our proposed interpretation that the terms ‘access’ to network elements ‘on an unbundled basis’ mean that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements for a separate fee.”), ¶269 (“We further conclude that ‘access’ to an unbundled element refers to the means by



1 incumbent's duty to provide nondiscriminatory access to unbundled network elements  
2 includes the time within which the element is provided. To that end, the FCC's rules  
3 implementing this section of the Act provide:

4       Where applicable, the terms and conditions pursuant to which an  
5 incumbent LEC offers to provide access to unbundled network elements,  
6 including but not *limited to, the time within which the incumbent provides*  
7 *such access to unbundled network elements*, shall, at a minimum, be no  
8 less favorable to the requesting carrier than the terms and conditions under  
9 which the incumbent LEC provides such elements to itself.<sup>273</sup>

10       The North Carolina state commission has dealt specifically with the obligation to  
11 provide expedited service on a non-discriminatory basis.<sup>274</sup> In arbitrating an  
12 interconnection involving BellSouth, the North Carolina commission found that  
13 BellSouth was required under the Telecommunications Act to provide expedited service  
14 pursuant to Section 251. BellSouth sought reconsideration of that conclusion, arguing  
15 that it had no obligation under Section 251 to expedite service orders and that its only  
16 requirement under Section 251 was to provide service according to its standard  
17 intervals.<sup>275</sup> BellSouth also argued, as Qwest argues here, that since it had no obligation  
18 under Section 251 to provide expedited service, it had no obligation to provide such  
19 service at TELRIC rates and that it could meet its nondiscriminatory obligation by  
20 charging CLECs the \$200 per day rate set out in its tariff.<sup>276</sup> The North Carolina  
21 commission rejected BellSouth's arguments and affirmed its conclusion that expedited  
22 service is subject to the nondiscrimination obligations of Section 251, stating, "The

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which requesting carriers obtain an element's functionality in order to provide a telecommunications service.").

<sup>273</sup> 47 C.F.R. §51.313(b) (emphasis added).

<sup>274</sup> *Re NewSouth Communications Corp.*, 2006 WL 707683 (N.C.U.C. February 8, 2006).

<sup>275</sup> *Id.* at \*43.

<sup>276</sup> *Id.* at \*44.

1 Commission also believes that expediting service to customers is simply one method by  
2 which BellSouth can provide access to UNEs and that, since BellSouth offers service  
3 expedites to its retail customers, it must provide service expedites at TELRIC rates  
4 pursuant to Section 251 and Rule 51.311(b).<sup>277</sup>

5 Qwest contends that it has no obligation to provide service at less than the  
6 standard interval and, accordingly, expedites are a “superior service” that is not subject to  
7 the requirements of Section 251.<sup>278</sup> Qwest relies on the decision by the Eighth Circuit in  
8 the *Iowa Utilities Board* case<sup>279</sup> for the proposition that Section 251 does not require  
9 ILECs to provide CLECs with “superior service.”<sup>280</sup> Qwest’s argument misreads the  
10 Eighth Circuit’s decision.

11 In *Iowa Utilities Board*, the Eighth Circuit held, among other things, that Section  
12 251 does not require incumbents to provide unbundled network elements and access to  
13 unbundled network elements at levels of quality *superior to what the incumbent provides*  
14 *itself*.<sup>281</sup> Qwest does not claim here that expedites are superior to the service that Qwest  
15 provides to itself (i.e., to its retail customers). To the contrary, it is undisputed that Qwest  
16 provides expedites to its retail customers in the ordinary course of its business<sup>282</sup> and that

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<sup>277</sup> *Id.* at \*47; *see also Re Verizon Delaware, Inc.*, 2002 WL 31521484 at \*12 (Del. Pub. Serv. Comm’n 2002) (requiring cost-based rate for expedited CLEC service orders).

<sup>278</sup> Tr. Vol. I, p. 177, lines 19-23 (“And so they’re asking Qwest to put service in place for unbundled loops faster than is necessary by the act. By definition that is superior service, and that means market-based rates should apply.” (Qwest counsel’s opening statement); *see also* Tr. Vol. III, p. 492, lines 11-18 (testimony of T. Million).

<sup>279</sup> *Iowa Utilities Board v. AT&T*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff’d in part and rev’d in part*, 525 U.S. 366 (1999) (*Iowa Utilities Board*).

<sup>280</sup> T. Million Direct (Hrg. Ex. Q-7), p. 3, line 27 – p. 4, line 6.

<sup>281</sup> 120 F.3d at 812.

<sup>282</sup> Tr. Vol. I, p. 199, lines 2-7 (Albersheim):

Q. Qwest provides expedites to its retail customers as a regular part of its business;  
is that right?

A. Yes.

1 it is necessary for CLECs to be able to obtain expedited service in order to be able to  
2 effectively compete.<sup>283</sup> Because Qwest provides expedited service to its retail customers,  
3 expedites are not a “superior service” as the Eighth Circuit used that term.

4 In arbitration proceedings between Eschelon and Qwest, the Minnesota  
5 Commission easily disposed of Qwest’s “superior service” argument, exposing the fallacy  
6 on which that argument is based:

7 In arguing that expediting a UNE is a “superior service” which Qwest is  
8 not obligated to provide – and certainly not obligated to provide at cost –  
9 Qwest misapplies a term of art. As noted above, the 8<sup>th</sup> Circuit and the  
10 FCC concluded that the 1996 Act does not provide a basis for the FCC to  
11 require ILECs to offer “superior” service – that is, to build facilities for  
12 CLECs if the ILE would not build comparable facilities for itself. In  
13 contrast to those circumstances, Qwest not only provides expedited service  
14 for itself, Qwest offers the service to other on its tariff. The concerns  
15 articulated by the 8<sup>th</sup> Circuit and the FCC regarding “superior service”  
16 have no relevance to this issue.<sup>284</sup>

17 **4. It is not discriminatory to have a separate (and different) rate for**  
18 **wholesale and retail.**

19 Ms. Albersheim testified that it is the “essence of non-discrimination” to charge  
20 the same price for retail and wholesale, and that to provide expedites for loops at a lower  
21 rate than the retail rate would constitute superior service.<sup>285</sup> Under federal law, the terms  
22 and conditions under which Qwest provides Eschelon with access to unbundled network

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Q. It provides expedites to retail customers who are purchasing DS1 private lines;  
correct?

A. Yes.

See also Tr. Vol. III, p. 517, line 18 – p. 518, line 2 (testimony of T. Million).

<sup>283</sup> Tr. Vol. II, p. 254, lines 6-11 (Albersheim).

<sup>284</sup> *Minnesota Arbitration*, Order Resolving Arbitration Issues, Requiring Filed Interconnection Agreement, Opening Investigations and Referring Issue to Contested Case Proceeding (March 30, 2007) at p. 18; see also Arbitrators’ Report at ¶221 (“When Eschelon requests an expedite, it will be for accessing a UNE. Under 478 C.F.R. § 51.307 and 51.313, it must be provided under Section 251 of the Act and, thus, at TELRIC rates.”).

<sup>285</sup> See Hrg. Ex. Q-1 (Albersheim Dir.), p. 12, line 2. See *id.* p. 12, line 4 (“This is the essence of non-discrimination.”).

1 elements must be no less favorable than the terms and conditions under which Qwest  
2 provides access *to itself*.<sup>286</sup> The relevant comparison, for purposes of determining  
3 whether charges are discriminatory, is between the charges faced by CLECs and the  
4 expedite charges that Qwest incurs when it expedites service to a retail customer.<sup>287</sup>  
5 Qwest acknowledges that its \$200 per day expedite rate is not a cost-based rate.<sup>288</sup>  
6 According to Qwest, the rate is intended to reflect “what the market will bear”<sup>289</sup> and is  
7 set at a level “that guarantees that only those customers for whom the priority to expedite  
8 an order is very high will request the service.”<sup>290</sup> When Qwest expedites service for one  
9 of its retail customers, it faces only its cost to expedite the service; Qwest does not  
10 “charge” itself a \$200 per day rate for an expedite.<sup>291</sup> Thus, it is discriminatory for Qwest  
11 to charge Eschelon the same \$200 per day rate that it charges its retail customers<sup>292</sup>

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<sup>286</sup> 47 C.F.R. §51.313(b).

<sup>287</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 45, line 7 – p. 46, line 9.

<sup>288</sup> Million Direct (Hrg. Ex. Q-7), p. 7, lines 15-21.

<sup>289</sup> Million Direct (Hrg. Ex. Q-7), p. 6, lines 11-14.

<sup>290</sup> Million Direct (Hrg. Ex. Q-7), p. 8, lines 4-6.

<sup>291</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 46, lines 3-6.

<sup>292</sup> In his opening statement, Qwest’s counsel suggested that Eschelon’s “discrimination claim has been moved to the side” and that “[W]e just got done hearing their witnesses, and *we didn’t hear a single person talk about discrimination.*” Tr. Vol. I, p. 166, lines 16-18 and p. 167, lines 18-21 (emphasis added). In fact, only a few transcript pages before counsel’s assertion that no Eschelon witness had talked about discrimination, Mr. Denney, on cross examination by Staff counsel, explained Eschelon’s allegation of discrimination as follows:

Well, I mean, I think when you look at -- for us to really look at discrimination, you look at -- I mean, I kind of think of Qwest as two pieces. There's Qwest a retail provider and there's Qwest a wholesale provider. And though I know Qwest isn't structured like this, in my mind, in essence, Qwest the wholesale provider provides service to its retail arm and it provides things to us.

And so the question -- the question on discrimination, in my mind, is really how does Qwest provide service to itself? What is the economic cost -- in terms of expedites, what is the economic cost to Qwest of performing an expedite, not what does Qwest charge its end user down the road.

To compare kind of a retail rate and a wholesale rate, those are arguments about -- not really about discrimination but about, you know, price squeeze. You would get into that type of debate. But it's really the comparison between what

1 because, in doing so Qwest is providing itself with more favorable expedite terms (i.e.,  
2 Qwest incurs a lower expedite cost) than it is providing to Eschelon.<sup>293</sup>

3 Before this case, Qwest recognized its obligation to provide expedites at cost-  
4 based rates. In 2001, Qwest confirmed that expedites were part of accessing unbundled  
5 network elements when it asked the Commission to establish an Individual Case Basis  
6 ("ICB) rate for expedites. In support of this request, Qwest's witness, Robert Kennedy,  
7 listed expedites as being included in the category of unbundled network elements,  
8 indicating Qwest's understanding that expedites were subject to cost-based pricing.<sup>294</sup> In  
9 that same docket, the Arizona Commission ordered that "Qwest is directed to develop  
10 cost studies for all services offered in this docket on an ICB price basis in Phase III.  
11 Qwest should make every effort to develop reasonable cost-based prices for such services  
12 even if it has little or no experience actually provisioning the service."<sup>295</sup> Because  
13 expedites were among the services offered on an ICB basis, the Commission's order to  
14 provide a cost study applied to expedites.<sup>296</sup> Qwest, in its Arizona SGAT, states, in  
15 connection with the ICB expedite rate, "Rates for this element will be proposed in the  
16 Arizona Cost Docket Phase III."<sup>297</sup> Although Qwest acknowledges that it is possible to

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is the economic cost for Qwest to provide it to itself, and that's the comparison  
with what the rate is. And we know it's not \$200 to do that.

Tr. Vol. I, p. 150, lines 5-24. Mr. Denney also discusses discrimination in his prefiled direct (adopted) at  
pp. 24-36 and his prefiled rebuttal at pp. 43-55, both of which have been admitted into the record in this  
proceeding. Qwest's claim that Eschelon's discrimination claim "has been moved to the side" is without  
basis.

<sup>293</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 46, lines 10-12 ("Charging Eschelon a non-cost based, retail price that  
is higher than Qwest's own expedite costs would violate rule § 51.313 because this price constitutes terms  
that are less favorable than terms faced by Qwest in expediting its own orders."; *see also* Denney Rebuttal  
(Hrg. Ex. E-4), p. 57, line 17 – p. 58, line 4.

<sup>294</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 40, line 2 – p. 41, line 2 and Exhibit DD-4.

<sup>295</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 41, lines 3-9 and Exhibit DD-4.

<sup>296</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 41, lines 9-10.

<sup>297</sup> Denney Rebuttal (Hrg. Ex. E-4), p. 41, line 11 – p. 42, line 6.

1 produce a cost study for expedites – having filed an expedite cost study in Minnesota  
2 pursuant to the Minnesota Commission’s order – its cost witness, Ms. Million, stated that  
3 Qwest has no intention to produce a cost study for expedites in connection with Arizona’s  
4 Phase III cost docket, notwithstanding the Arizona Commission’s order that Qwest make  
5 “every effort” to do so.<sup>298</sup> Consistent with the Commission’s prior order on this issue, the  
6 Arizona Commission Staff has recommended that the expedite rate should be considered  
7 in the next cost docket.<sup>299</sup> The Commission should again confirm Qwest’s obligation to  
8 provide expedited loops at cost-based rates.

9 The nondiscrimination requirement of Section 251(c)(3) includes the obligation to  
10 provide unbundled network elements on terms and conditions that provide CLECs with a  
11 meaningful opportunity to compete.<sup>300</sup> The adverse impact of charging Eschelon the  
12 same non-cost based expedite rate that Qwest charges its retail customers on Eschelon’s  
13 ability to compete is manifest. Eschelon and Qwest compete in the retail market and this  
14 competition includes an ability to offer expedited service to retail customers on  
15 competitive terms. By charging Eschelon a wholesale expedite price that exceeds the cost

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<sup>298</sup> Tr. Vol. III, p. 509, line 13 – p. 512, line 7 (testimony of T. Million).

<sup>299</sup> Staff Direct (Hrg. Ex. S-1), p. 40.

<sup>300</sup> See *First Report and Order* at ¶ 315:

[A]t a minimum, whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because section 251(c)(3) includes the terms “just and reasonable,” this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act’s goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. \*\*\*\* We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.

1 of providing the expedite, Qwest is gaining an unfair advantage because Qwest the  
2 difference between the wholesale price and Qwest's cost represents a profit to Qwest.  
3 The advantage to Qwest would be the same as the advantage that Qwest would have if it  
4 charged above-cost rates for UNE loops and other UNE elements – a situation that the  
5 unbundling rules and TELRIC pricing are designed to avoid.<sup>301</sup> The claim that “Eschelon  
6 is actually getting superior rates and conditions”<sup>302</sup> is based on a false comparison  
7 between a retail price and a wholesale price.<sup>303</sup>

8 **III. CONCLUSION:**  
9 **THE COMMISSION SHOULD ADOPT THE RECOMMENDATIONS**  
10 **OUTLINED IN THE EXECUTIVE SUMMARIES**  
11 **TO THIS BRIEF AND TO STAFF TESTIMONY**

12 For all the reasons stated, the Commission should adopt the recommendations  
13 outlined in the Executive Summary of Relief Requested to this Brief. They are consistent  
14 with this Commission's previous orders, the facts, and the law, as well as the  
15 recommendations in Staff's Executive Summary.

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<sup>301</sup> D. Denney Rebuttal (Hrg. Ex. E-4), p. 46, lines 10-20.

<sup>302</sup> Albersheim Direct (Hrg. Ex. Q-1), p. 13, line 18.

<sup>303</sup> D. Denney Rebuttal (Hrg. Ex. E-4), p. 47, lines 1-3.

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2 Dated: October 22, 2007

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GRAY, PLANT, MOOTY, MOOTY  
& BENNETT, P.A.

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By: 

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COUNSEL FOR ESCHELON TELECOM  
OF ARIZONA, INC.

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## **EXHIBIT 1**

### **ICA PROVISIONS – ARIZONA**

This is Exhibit 1 to Eschelon's Complaint (April 14, 2006). It was also an attachment to Eschelon's March 21, 2006 Escalation and Dispute Resolution Letter to Qwest. See Att. A-7 at 000134-000136 in Hrg. Ex. E-1 (Johnson Dir.).

**ICA PROVISIONS - ARIZONA**  
**(See footnotes for CO/MN/OR/UT/WA)**

**EXCERPTS FROM ATTACHMENT 5 (BUSINESS PROCESS REQUIREMENTS)**

**3.2.2 Service Migrations and New Customer Additions<sup>1</sup>**

3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.

3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify COPROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

**3.2.4 Due Date<sup>2</sup>**

3.2.4.2 For those services and circumstances that U S WEST and COPROVIDER agree shall be handled by the standard interval process, U S WEST shall supply CO-PROVIDER with standard due date intervals on a nondiscriminatory basis to be used by CO-PROVIDER personnel to determine service installation dates. Under those circumstances U S WEST shall complete the provisioning within the standard interval.

3.2.4.2.1 If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.

3.2.4.3 For those services and circumstances that U S WEST and COPROVIDER agree shall be handled by the requested/committed due date process, CO-PROVIDER may request a due date on each order. U S WEST will provide an offered due date on a nondiscriminatory basis. If CO-PROVIDER accepts the offered due date then such date shall become the committed due date. U S WEST will complete the order on the committed due date unless otherwise authorized by CO-PROVIDER.

3.2.4.3.1 If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the COPROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply.

3.2.4.4 Subsequent to an initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.

SEE ALSO –

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<sup>1</sup> See Colorado ICA Attachment 8 Business Processes Sections: 2.1.17, 2.2.13, Minnesota ICA Attachment -5 Section 7.4.2 and Section 9.2, Oregon ICA Attachment 5 Section 7.4.2 and Section 9.2, Utah ICA Attachment 5 Sections 3.2.2.12 and 3.2.2.13, Washington ICA Attachment 5 Sections 3.2.2.12 and 3.2.2.13

<sup>2</sup> See Colorado ICA Attachment 8 Business Processes Section: 2.2.2.1.6, Minnesota ICA Attachment 5 Section 9.1 and Section 9.3, Oregon ICA Attachment 5 Section 9.1 and Section 9.3, Utah ICA Attachment -5 Section 3.2.4, Washington ICA Attachment 5 Section 3.2.4

## **2.1 General Business Requirements<sup>3</sup>**

2.1.4.7 U S WEST shall provide provisioning support outside of scheduled work hours on a nondiscriminatory exception basis as requested by COPROVIDER. Such support may be subject to a minimum labor charge.

## **4. Connectivity Billing and Recording<sup>4</sup>**

This Section 4 describes the requirements for U S WEST to bill and record all charges CO-PROVIDER incurs for purchasing services under this Agreement.

4.1.2 U S WEST shall record and bill in accordance with this Agreement those charges COPROVIDER incurs as a result of CO-PROVIDER purchasing from U S WEST services, as set forth in this Agreement (hereinafter "Connectivity Charges").

### **4.1.18 Bill Reconciliation<sup>5</sup>**

4.1.18.4 If the dispute is not resolved within the allotted time frame, the following resolution procedure shall begin:

4.1.18.4.1 If the dispute is not resolved within sixty (60) days of the Notice of Discrepancy, the dispute shall be escalated to the second level of management for resolution.

4.1.18.4.2 If the dispute is not resolved within ninety (90) days of Notice of Discrepancy, the dispute shall be escalated to the third level of management for resolution.

4.1.18.4.3 If the dispute is not resolved within one hundred and twenty (120) days of the Notice of Discrepancy, upon the written request of either Party within such one hundred and twenty (120) day period, the dispute may be resolved pursuant to the dispute resolution provision set forth in Part A of this Agreement.

## **6.2 General Requirements<sup>6</sup>**

6.2.1 U S WEST shall provide repair, maintenance, testing, and surveillance for all Telecommunications Services and unbundled Network Elements and Combinations in accordance with the terms and conditions of this Agreement.

6.2.1.1 U S WEST shall provide CO-PROVIDER with the same level of maintenance support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These

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<sup>3</sup> See Colorado ICA Attachment 8 Business Processes Section: 2.1.2.4, Minnesota ICA Attachment 5 Section 2.4, Oregon ICA Attachment 5 Section 2.4, Utah ICA Attachment 5 Section 2.1.4.7, Washington ICA Attachment 5 Section 2.1.4.7

<sup>4</sup> See Colorado ICA Attachment 8 Business Processes Section 3.1.2, Minnesota ICA Attachment 7 Section 2.1, Oregon ICA Attachment 7 Section 2.1, Utah ICA Attachment 5 Section 4.1.2, Washington ICA Attachment 5 Section 4.1.2

<sup>5</sup> See Colorado ICA Attachment 8 Business Processes Section 3.1.18.4, Minnesota ICA Attachment 7 Section 14, Oregon ICA Attachment 7 Section 14, Utah ICA Attachment 5 Section 4.1.18.4, Washington ICA Attachment 5 Section 4.1.18.4

<sup>6</sup> See Colorado ICA Attachment 8 Business Processes Section 5.1.2, See Minnesota ICA Attachment 6 Section 1, Oregon ICA Attachment 6 Section 4, Utah ICA Attachment 5 Section 6.2.1, Washington ICA Attachment 5 Section 6.2.1

standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to CO-PROVIDER under this Agreement.

#### EXCERPTS FROM PART A (TERMS AND CONDITIONS)

### **3. Payment<sup>7</sup>**

3.1 In consideration of the services provided by U S WEST under this Agreement, COPROVIDER shall pay the charges set forth in Attachment 1 to this Agreement. The billing procedures for charges incurred by CO-PROVIDER hereunder are set forth in Attachment 5 to this Agreement.

3.2 Amounts payable under this Agreement, unless reasonably disputed, are due and payable within thirty (30) days after the date of U S WEST's invoice or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.

### **27. Dispute Resolution<sup>8</sup>**

**27.2<sup>14</sup> In the event CO-PROVIDER and U S WEST are unable to agree on certain issues during the term of this Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.**

### **31. Warranties<sup>9</sup>**

31.1 U S WEST shall conduct all activities and interfaces which are provided for under this Agreement with CO-PROVIDER Customers in a carrier-neutral, nondiscriminatory manner.

#### EXCERPT FROM ATTACHMENT 1 (RATES AND CHARGES)

### **1. General Principles<sup>10</sup>**

1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

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<sup>7</sup> See Colorado ICA Part A Section 5.1, Minnesota ICA Part A Section: 2.1, Oregon ICA Part A Section 2.1, Utah ICA Part A Section 3.1 and Section 3.2, Washington ICA Part A Section 3.1 and Section 3.2

<sup>8</sup> See Colorado ICA Part A Section 24.1, Minnesota ICA Part A Section 11, Oregon ICA Part A Section 11, Utah ICA Part A Section 27.2, Washington ICA Part A Section 27.2

<sup>9</sup> See Colorado ICA Part A Section 14.1, Minnesota ICA Part A Section 9.2, Oregon ICA Part A Section 9.2, Utah ICA Part A Section 31.1, Washington ICA Part A Section 31.1

<sup>10</sup> Utah ICA Attachment 1 Section 1.2, Washington ICA Attachment 1 Section 1.2

## **EXHIBIT 2**

### **ICA PROVISIONS – ARIZONA – SELECTED PAGES**

This Exhibit contains pages from the current, approved Qwest-Eschelon ICA in Arizona (per the discussion at the hearing, see Tr. Vol. II, p. 219, line 22- p. 220, line 16).

**AGREEMENT  
FOR LOCAL WIRELINE NETWORK INTERCONNECTION  
AND  
SERVICE RESALE**

**Between  
ADVANCED TELECOMMUNICATIONS, INC.  
and  
U S WEST Communications, Inc.**

**For the State of  
Arizona**

**Agreement Number  
CDS-000106-0212**

## **2. Most Favored Nation Terms and Treatment**

- 2.1 Until such time as there is a final court determination interpreting Section 252(i) of the Act, U S WEST shall make available to CO-PROVIDER the terms and conditions of any other agreement for Interconnection, unbundled Network Elements and resale services approved by the Commission under Section 252 of the Act, in that agreement's entirety. After there is a final court determination interpreting Section 252(i) of the Act, the Parties agree to revise this Section 2.1 to reflect such interpretation.<sup>3</sup>

## **3. Payment**

- 3.1 In consideration of the services provided by U S WEST under this Agreement, CO-PROVIDER shall pay the charges set forth in Attachment 1 to this Agreement. The billing procedures for charges incurred by CO-PROVIDER hereunder are set forth in Attachment 5 to this Agreement.
- 3.2 Amounts payable under this Agreement, unless reasonably disputed, are due and payable within thirty (30) days after the date of U S WEST's invoice or within twenty (20) days after receipt of the invoice, whichever is later. If the payment due date is not a Business Day, the payment shall be made the next Business Day.
- 3.3 A late payment charge of 1.5% applies to all billed balances, not reasonably disputed, which are not paid within the applicable time period set forth in Section 3.2 above. To the extent CO-PROVIDER pays the billed balance on time, but the amount of the billed balance is reasonably disputed by CO-PROVIDER, and, it is later determined that a refund is due CO-PROVIDER, interest shall be payable on the refunded amount in the amount of 1.5% per month. To the extent CO-PROVIDER pays the billed balance on time, but the amount of the billed balance is reasonably disputed by CO-PROVIDER, and, it is later determined that no refund is due CO-PROVIDER, no interest shall be payable on the disputed amount.
- 3.4 Late payment charges shall not be used as a "credit" to a deposit, if any, without the express approval of U S WEST.
- 3.5 Unless specified otherwise in this Agreement, U S WEST shall bill all amounts due from CO-PROVIDER for each resold service in accordance with the terms and conditions as specified in the U S WEST tariff.

## **4. Taxes**

- 4.1 Any federal, state or local excise, sales, or use taxes (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party so obligated to pay any such taxes may contest the same in good faith, at its own expense, and shall be entitled to the benefit of any refund or recovery, provided that such Party shall not permit any lien to exist on any asset of the other Party by reason of the contest. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. To the extent a sale is claimed to be for resale tax exemption, the purchasing Party shall furnish the providing Party a proper resale

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<sup>3</sup> MCIIm Order, p. 29 and AT&T Order, p. 35.

## 27. Dispute Resolution

27.1<sup>13</sup> If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it may be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof and shall be noticed to the Commission. The arbitrator shall determine which Party or Parties will bear the costs of arbitration, including apportionment, if appropriate. The arbitration shall occur in Denver, Colorado, and the governing law shall be in accordance with Section 21.1 above.

27.2<sup>14</sup> In the event CO-PROVIDER and U S WEST are unable to agree on certain issues during the term of this Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.

27.3 If a Dispute is submitted to arbitration pursuant to Section 27.1 above, the procedures described in this Section 27.3 shall apply, notwithstanding the then current rules of the AAA. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set forth below. Each party may submit in writing to a Party, and that Party shall so respond, to an agreed amount of the following: interrogatories, demands to produce documents, and requests for admission. Not less than ten (10) days prior to the arbitration hearing, the Parties shall exchange witness and exhibit lists. Deposition discovery shall be controlled by the arbitrator. Additional discovery may be permitted upon mutual agreement of the Parties or the determination of the arbitrator. The arbitration hearing shall be commenced within thirty (30) days after a demand for arbitration by either Party and shall be held in Denver, Colorado. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within seven (7) days after the close of the hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. The decision of the arbitrator shall be final and binding upon the Parties and judgment upon the award rendered by the arbitrator may be entered in a court having jurisdiction. The decision shall also be submitted to the Commission.

## 28. Nondisclosure

28.1 All information, including, but not limited to, specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data (a) furnished by one Party to the other Party dealing with Customer specific, facility specific, or usage specific information, other than Customer information communicated for the purpose of publication of directory database inclusion, or (b) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (c) declared orally or in writing to the Recipient at the time of delivery, or by written notice given to the

<sup>13</sup> AT&T Order, p. 33 at Issue 76.

<sup>14</sup> AT&T Order, p. 33 at Issue 76.



To U S WEST:

Director – Interconnection Compliance  
1801 California Street, Room 2410  
Denver, CO 80202

Copy to: U S WEST, Communications, Inc..  
General Counsel, Law Dept.  
1801 California, 49<sup>th</sup> Floor  
Denver, Colorado 80202

- 29.2 If personal delivery is selected to give notice, a receipt of such delivery shall be obtained. The address to which notices or communications may be given to either Party may be changed by written notice given by such Party to the other pursuant to this Section 29.

### 30. Assignment

- 30.1 Neither Party may assign, transfer (whether by operation of law or otherwise) or delegate this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party, which consent shall not be unreasonably withheld, provided that each Party may assign this Agreement to an Affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Any attempted assignment or transfer that is not permitted under the provisions of this Section 30 is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement.
- 30.2 If any obligation of U S WEST under this Agreement is performed by a subcontractor or Affiliate, U S WEST shall remain fully responsible for the performance of this Agreement in accordance with its terms, and U S WEST shall be solely responsible for payments due to its subcontractors.
- 30.3 If any obligation of CO-PROVIDER under this Agreement is performed by a subcontractor or Affiliate, CO-PROVIDER shall remain fully responsible for the performance of this Agreement in accordance with its terms, and CO-PROVIDER shall be solely responsible for payments due to its subcontractors.

### 31. Warranties

- 31.1 U S WEST shall conduct all activities and interfaces which are provided for under this Agreement with CO-PROVIDER Customers in a carrier-neutral, nondiscriminatory manner.
- 31.2 U S WEST warrants that it has provided, and during the term of this Agreement it will continue to provide, to CO-PROVIDER true and complete copies of all material agreements in effect between U S WEST and any third party (including Affiliates) providing any services to CO-PROVIDER on behalf of or under contract to U S WEST in connection with U S WEST's performance of this Agreement, or from whom U S WEST has obtained licenses or other rights used by U S WEST to perform its obligations under this Agreement, provided, however, that U S WEST may provide such agreements under appropriate protective order.

to which the injured Party may be entitled at law or equity in case of any breach or threatened breach by the other Party of any provision of this Agreement. Use of one or more remedies shall not bar use of any other remedy for the purpose of enforcing the provisions of this Agreement.

**34. Waivers**

- 34.1 No waiver of any provisions of this Agreement and no consent to any default under this Agreement shall be effective unless the same shall be in writing and properly executed by or on behalf of the Party against whom such waiver or consent is claimed.
- 34.2 No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right or condition.
- 34.3 Waiver by either Party of any default or breach by the other Party shall not be deemed a waiver of any other default or breach.
- 34.4 By entering into this Agreement, neither Party waives any right granted to it pursuant to the Act.

**35. No Third Party Beneficiaries**

- 35.1 The provisions of this Agreement are for the benefit of the Parties hereto and not for any other person; provided, however, that this shall not be construed to prevent CO-PROVIDER from providing its Telecommunications Services to other carriers. This Agreement shall not provide any person not a party hereto with any remedy, claim, liability, reimbursement, claim of action, or other right in excess of those existing without reference hereto.

**36. Physical Security**

- 36.1 U S WEST shall exercise the same degree of care to prevent harm or damage to CO-PROVIDER or its employees, agents or subscribers, or its property as U S WEST provides itself. CO-PROVIDER shall exercise the same degree of care to ensure the security of its equipment physically collocated within U S WEST's space as CO-PROVIDER provides such security to itself.
  - 36.1.1 U S WEST will restrict access to approved personnel to U S WEST's buildings. CO-PROVIDER is responsible for the action of its employees and other authorized non-CO-PROVIDER personnel; U S WEST is responsible for the action of its employees and other authorized non-U S WEST personnel.
  - 36.1.2 U S WEST will furnish to CO-PROVIDER the current name(s) and telephone number(s) of those central office supervisor(s) where a physical collocation arrangement exists. The central office supervisor(s) will be the only U S WEST employee(s) with access to CO-PROVIDER collocation space.
  - 36.1.3 U S WEST will comply at all times with U S WEST security and safety procedures at the individual central office locations where CO-PROVIDER has physical collocation arrangements. The Parties will cooperate to analyze security procedures of each company to evaluate ways in which security procedures of US WEST may be enhanced.
  - 36.1.4 U S WEST will allow CO-PROVIDER to inspect or observe its physical spaces which house or contain CO-PROVIDER equipment or equipment enclosures at any time upon completion of the physical collocation quotation. Upon completion of

abrogated by a successful challenge to this Agreement (or the order approving this Agreement) as permitted by applicable law. By signing this Agreement, neither Party waives its right to pursue such a challenge.

- 54.2 The Parties enter into this Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

**Advanced Telecommunications, Inc.\*\***

**U S WEST Communications, Inc.\*\***

\_\_\_\_\_  
Signature

\_\_\_\_\_  
\*Signature

F. Lynne Powers  
Name Printed/Typed

Katherine L. Fleming  
Name Printed/Typed

Vice President - Finance  
Title

Vice President - Interconnection  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

\* Signed as ordered by the arbitrator/commission in Docket Nos. U-2428-96-417, E-1051-96-417, U-3175-96-479 and E-1051-96-479. Signature does not indicate agreement with all aspects of the arbitrator's decision, nor does it waive any of U S WEST's right to seek judicial review of all or part of the agreement, or to reform the agreement as the result of successful judicial review.

\*\* This Agreement is made pursuant to Section 252 (i) of the Act and is premised upon the Interconnection Agreement between AT&T Communications of the Mountain States, Inc. and U S WEST Communications, Inc. (the "Underlying Agreement"). The Underlying Agreement was approved by the Commission on July 31, 1997.

With respect to this Agreement, the Parties understand and agree:

- i) The Parties shall request the Commission to expedite its review and approval of this Agreement.
- ii) Notwithstanding the mutual commitments set forth herein, the Parties are entering into this Agreement without prejudice to any positions they have taken previously, or may take in the future, in any legislative, regulatory, or other public forum addressing any matters, including those relating to the types of arrangements contained in this Agreement. During the proceeding in which the Commission is to review and approve the Agreement, U S WEST may point out that it has objected, and continues to object, to the inclusion of the terms and conditions to which it objected in the proceedings involving the approval of the Underlying Agreement.
- iii) This Agreement contains provisions based upon the decisions and orders of the FCC and the Commission under and with respect to the Act. Currently, court and regulatory proceedings affecting the subject matter of this Agreement are in various stages, including the proceedings where certain of the rules and regulations of the FCC are being challenged. In addition, there is uncertainty in the aftermath of the Supreme Court's decision in AT&T Corp. et al. v. Iowa Utilities Board. Based on that uncertainty, and

the regulatory and judicial proceedings which will occur as a result of that decision, the Parties acknowledge that this Agreement may need to be changed to reflect any changes in law. The Agreement has not been corrected to reflect the requirements, claims or outcomes of any of the Proceedings, although the pricing does reflect the Commission's most current generic order, if any. Accordingly, when a final, decision or decisions are made in the Proceedings that automatically change and modify the Underlying Agreement, then like changes and modifications will similarly be made to this Agreement. In addition, to the extent rules or laws are based on regulatory or judicial proceedings as a result of the recent Supreme Court decision, this Agreement will be amended to incorporate such changes.

iv) Subsequent to the execution of this Agreement, the FCC or the Commission may issue decisions or orders that change or modify the rules and regulations governing implementing of the Act. If such changes or modifications alter the state of the law upon which the Underlying Agreement was negotiated and agreed, and it reasonably appears that the parties to the Underlying Agreement would have negotiated and agreed to different term(s) condition(s) or covenant(s) than as contained in the Underlying Agreement had such change or modification been in existence before execution of the Underlying Agreement, then this Agreement shall be amended to reflect such different terms(s), condition(s), or covenant(s). Where the parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

v) This Agreement shall continue in force and effect until terminated by either Party. The Agreement can be terminated on thirty (30) days notice, if another Interconnection Agreement will not replace the current Agreement. If there is a replacement Interconnection Agreement, one Party can notify the other Party that it is requesting Section 251/252 negotiations under the Federal Telecommunications Act of 1996 ("Act"). That notification will trigger the timeframes and procedures contained in Section 252 of the Act. In the event of such notice, the arrangements between our companies shall continue and be governed by the terms of the expired agreement until the new agreement is approved by the appropriate state commission.

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## **RATES and CHARGES**

### **1. General Principles**

- 1.1 All rates provided under this Agreement shall remain in effect for the term of this Agreement unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC, or the Commission's rules and regulations.
- 1.2 Except as otherwise specified in this Agreement, as approved or ordered by the Commission, or as agreed to by the Parties through good faith negotiations, nothing in this Agreement shall prevent a Party through the dispute resolution process described in this Agreement from seeking to recover the costs and expenses, if any, it may incur in (a) complying with and implementing its obligations under this Agreement, the Act, and the rules, regulations and orders of the FCC and the Commission, and (b) the development, modification, technical installation and maintenance of any systems or other infrastructure which it requires to comply with and to continue complying with its responsibilities and obligations under this Agreement.

### **2. Resale Rates and Charges**

- 2.1<sup>1</sup> **The Customer Transfer Charge ("CTC") for resale customers switching to CO-PROVIDER from U S WEST, and U S WEST's applicable resale discount rates are set forth on Schedule 1 of this Agreement..**
- 2.2 **CO-PROVIDER shall be permitted to demonstrate what its own cost will be upon termination of a resale customer, so that amount may be discounted from the CTC payable to U S WEST.**
- 2.3 If the resold services are purchased pursuant to tariffs and the tariff rates change, charges billed to CO-PROVIDER for such services will be based upon the new tariff rates less the applicable wholesale discount as agreed to herein. The new rate will be effective upon the tariff effective date.
- 2.4 A Subscriber Line Charge (SLC) will continue to be paid by CO-PROVIDER without discount for each local exchange line resold under this Agreement. All federal and state rules and regulations associated with SLC or as found in the applicable tariffs also apply.
- 2.5 CO-PROVIDER will pay to U S WEST the PIC change charge without discount associated with CO-PROVIDER end user changes of interexchange or intraLATA carriers.
- 2.6 CO-PROVIDER agrees to pay U S WEST at the wholesale discount rate when its end user activates any services or features that are billed on a per use or per activation basis (e.g., continuous redial, last call return, call back calling, call trace, etc.). U S WEST shall provide CO-PROVIDER with detailed billing information per applicable OBF standards unless otherwise agreed to by the Parties as necessary to permit CO-PROVIDER to bill its end users such charges.

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<sup>1</sup> MCIIm Order, p. 24 at Issue 41.

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## UNBUNDLED ACCESS/ELEMENTS

### 1. Introduction

- 1.1 U S WEST shall provide unbundled Network Elements in accordance with this Agreement, the Act, FCC rules and regulations, and state rules, regulations and orders. The price for each Network Element is set forth in Attachment 1 of this Agreement. Except as otherwise set forth in this Attachment, CO-PROVIDER may order Network Elements as of the Effective Date of this Agreement.
- 1.2 General Terms
  - 1.2.1 U S WEST agrees to make available the following unbundled Network Elements which are addressed in more detail in the following sections of this Attachment: (a) local loop, (b) local and tandem switches **(including all vertical switching features provided by such switches)**, (c) interoffice transmission facilities, (d) network interface devices, (e) signaling and call-related database facilities, (f) operations support systems functions, and (g) operator and directory assistance facilities.<sup>1</sup>
  - 1.2.2 **U S WEST shall offer each Network Element individually and in Combinations with any other Network Element or Network Elements in order to permit CO-PROVIDER to combine such Network Element or Network Elements obtained from U S WEST or with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. CO-PROVIDER may purchase unbundled Network Elements individually or in Combinations without restrictions as to how those elements may be rebundled.**<sup>2</sup>

### 2. Unbundled Network Elements

- 2.1 U S WEST shall offer Network Elements to CO-PROVIDER on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.
- 2.2 U S WEST shall permit CO-PROVIDER to connect CO-PROVIDER's facilities or facilities provided to CO-PROVIDER by third parties with each of U S WEST's unbundled Network Elements at any technically feasible point designated by CO-PROVIDER.
- 2.3 CO-PROVIDER may use one or more Network Elements to provide any feature, function, capability, or service option such Network Element(s) is capable of providing or any feature, function, capability, or service option described in the technical references identified herein, or as may otherwise be determined by CO-PROVIDER.

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<sup>1</sup> MCIIm Order, p. 25 and AT&T Order, p. 11 at Issue 18.

<sup>2</sup> MCIIm Order, p. 11 at Issue 14 and AT&T Order, p. 13 at Issue 25.



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2.1.4.6.7 Until an impartial entity is appointed to administer telecommunications numbering, U S WEST will assign NXX codes to CO-PROVIDER in accordance with national guidelines at no charge and on a nondiscriminatory basis.

2.1.4.6.8 Each Party is responsible for administering NXX codes assigned to it. Each Party is responsible for obtaining LERG listings of CLLI codes assigned to its switches. Each Party shall use the LERG published by Bellcore or its successor for obtaining routing information and shall provide all required information to Bellcore for maintaining the LERG in a timely manner.

2.1.4.7 U S WEST shall provide provisioning support outside of scheduled work hours on a nondiscriminatory exception basis as requested by CO-PROVIDER. Such support may be subject to a minimum labor charge.

2.1.4.8 Service Assurance Warranties and Incentives: U S WEST shall provide to CO-PROVIDER service assurance warranties and incentives as U S WEST provides such service warranties and incentives to its own end users or any other Person except as otherwise provided by the Commission.

2.1.4.9 Availability of Network Capacity: Consistent with CO-PROVIDER's forecasts, U S WEST shall deploy and keep deployed network facilities for CO-PROVIDER services in a non-discriminatory manner and in the same manner as U S WEST makes such facilities available to itself for its services.

2.1.4.10 Workcenter Interface Methods and Procedures: U S WEST and CO-PROVIDER shall finalize interface methods and procedures between their respective work centers detailing systems and processes for ordering and provisioning. Such methods and procedures shall be completed within one hundred twenty (120) days after a written request by either Party. The lack of workcenter interface methods and procedures shall not inhibit the provision of services under this Agreement.

## **2.2 Service Order Process Requirements**

2.2.1 [Intentionally left blank for numbering consistency]

2.2.2 Specific Unbundling Requirements

2.2.2.1 When ordering a Combination, CO-PROVIDER shall have the option of ordering all features, functions and capabilities of each Network Element.

2.2.2.2 When CO-PROVIDER orders Network Elements, U S WEST shall provision all features, functions, and capabilities appropriate to the Network Elements which may include, but are not limited to:

2.2.2.2.1 the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to U S WEST's Customers, such as telephone number, white page listing, and dial tone; and

### 3.1.5 Ordering Interconnection

The Parties agree to utilize the OBF-ASR process for ordering interconnection trunks, which is the same process used to order Access Services. When the ordering Party requests facilities, routing, or optional features different than those determined to be available, the Parties will work cooperatively in determining an acceptable configuration based on available facilities, equipment and routing plans.

## 3.2 Service Order Process Requirements

### 3.2.1 OBF Compliance

3.2.1.1 U S WEST and CO-PROVIDER shall generally follow the OBF-developed ordering and provisioning process guidelines. These processes include, but are not limited to, pre-order service inquiry, pre-order service inquiry response, firm order, acknowledgment/rejection, firm order confirmation, delay notification, and completion notification. U S WEST agrees to work cooperatively to generally comply with future OBF developed guidelines.

### 3.2.2 Service Migrations and New Customer Additions

3.2.2.1 For Resale Services, U S WEST shall not require a disconnect order from a Customer, another local service provider, or any other entity, to process an CO-PROVIDER order to establish CO-PROVIDER Local Service and/or migrate a Customer to CO-PROVIDER Local Service.

3.2.2.2 For Resale Services, U S WEST shall not disconnect any Customer service or existing features available under this Agreement at any time during the migration of that Customer to CO-PROVIDER service without CO-PROVIDER's prior agreement.

3.2.2.3 For services provided through unbundled Network Elements, U S WEST shall recognize CO-PROVIDER as an agent for the Customer in coordinating the disconnection of services provided by another CLEC or U S WEST.

3.2.2.4 Unless otherwise directed by CO-PROVIDER, when CO-PROVIDER orders Resale Services or Network Elements, all trunk or telephone numbers currently associated with existing services shall be retained without loss of feature capability and without loss of associated ancillary services including, but not limited to, Directory Assistance and 911/E911 capability for those services or features which U S WEST controls and which are available under this Agreement.

3.2.2.5 For Customer conversions requiring coordinated cut-over activities, U S WEST and CO-PROVIDER will agree on a scheduled conversion time(s), which will be a designated two-hour time period within a designated date. Unless expedited, **U S WEST and CO-PROVIDER shall schedule the cut-over window at least forty-eight (48) hours in advance, and as part of the scheduling, U S WEST shall estimate for CO-PROVIDER the duration of any service interruption that the cut-over might cause.**<sup>2</sup> The cut-over time will be defined

<sup>2</sup> MCIIm Order, p. 10 at Issue 13.

as a thirty (30) minute window within which both the CO-PROVIDER and U S WEST personnel will make telephone contact to complete the cut-over.

3.2.2.5.1 U S WEST will coordinate activities of all U S WEST work groups involved with the conversion. This coordination will include, but not be limited to, work centers charged with manual cross-connects, electronic cross-connect mapping, and switch translations (including, but not limited to, implementation of Interim Number Portability translations).

3.2.2.5.2 As soon as possible, but in no event later than one (1) hour after completion, U S WEST will notify CO-PROVIDER when coordinated cut-over is complete.

3.2.2.5.3 End user service interruption shall not exceed twenty (20) minutes during any cut-over. The average interruption caused by the cut-over of CO-PROVIDER Customers shall not exceed ten (10) minutes. If any service interruption is to exceed twenty (20) minutes, however, U S WEST will immediately notify CO-PROVIDER of such delay.

3.2.2.5.4 Within the appointed thirty (30) minute cut-over time, the U S WEST personnel will call the CO-PROVIDER personnel designated to perform cross-connection work and when the U S WEST person is reached in that interval such work will be promptly performed. If the CO-PROVIDER person is not ready within the appointed interval, and if CO-PROVIDER had not called to reschedule the work at least two (2) hours prior to the start of the interval, U S WEST and CO-PROVIDER will reschedule the work order and CO-PROVIDER will pay the non-recurring installation charge for the unbundled loops scheduled for the missed appointment. In addition, non-recurring installation charges for the rescheduled appointment will apply. If the U S WEST person is not available or not ready at any time during the thirty (30) minute interval, CO-PROVIDER and U S WEST will reschedule and U S WEST will waive the non-recurring charge for the unbundled loops scheduled for that interval. If unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party. Delays caused by the customer are the responsibility of CO-PROVIDER. In addition, if CO-PROVIDER has ordered INP as a part of the unbundled loop installation, U S WEST will coordinate implementation of INP with the unbundled loop installation.

3.2.2.6 Service Order: U S WEST shall provide CO-PROVIDER the capability to issue a service order for unbundled Network Elements, Combinations, and Resale Services.

3.2.2.7 PLOC Changes: U S WEST shall provide CO-PROVIDER the capability to transfer a customer with no feature changes to CO-PROVIDER through a streamlined PLOC (Primary Local Carrier) transfer process.

3.2.2.8 Status: U S WEST shall provide the CO-PROVIDER status on a service order when the status of the order changes.

- 3.2.2.9 Modifies: U S WEST shall provide CO-PROVIDER the capability to modify the service order any time after it has been issued; however, U S WEST may require the issuance of a supplemental or change order.
- 3.2.2.10 Cancel: U S WEST shall provide CO-PROVIDER the capability to cancel the service order any time after it has been issued.
- 3.2.2.11 Coordinated Service Orders: U S WEST shall provide CO-PROVIDER the capability to relate coordinated services orders, and identify those service orders that require coordination with CO-PROVIDER, or the subscriber, or the subscriber's vendor. When so identified, U S WEST will follow any specific instructions indicated on the service order so that the subscriber's service is not negatively affected by the service turn-up activity.
- 3.2.2.12 Expedite Process: U S WEST and CO-PROVIDER shall mutually develop expedite procedures to be followed when CO-PROVIDER determines an expedite is required to meet subscriber service needs.
- 3.2.2.13 Expedites: U S WEST shall provide CO-PROVIDER the capability to expedite a service order. Within two (2) business hours after a request from CO-PROVIDER for an expedited order, U S WEST shall notify CO-PROVIDER of U S WEST's confirmation to complete, or not complete, the order within the expedited interval.

### **3.2.3 Intercept Treatment and Transfer of Service Announcements**

- 3.2.3.1 U S WEST shall provide unbranded intercept treatment and transfer of service announcements to CO-PROVIDER Customers. U S WEST shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, in the same manner as that which U S WEST provides to its own end users. U S WEST's current standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. CO-PROVIDER may request extensions at parity with that which U S WEST provides to its end-users.
- 3.2.3.2 Pursuant to this Agreement, CO-PROVIDER shall provide unbranded intercept treatment and transfer of service announcements to U S WEST Customers. CO-PROVIDER shall provide such treatment and transfer of service announcement for all service disconnects, suspensions, or transfers, at parity with that which CO-PROVIDER provides its own end users. CO-PROVIDER standard time periods for providing such announcements is three (3) months for residential service and twelve (12) months for business service. U S WEST may request extensions at parity with that which CO-PROVIDER provides to its end-users.

### **3.2.4 Due Date**

- 3.2.4.1 U S WEST and CO-PROVIDER shall mutually agree on what services and circumstances are subject to the standard interval process to determine the due date or the requested/committed due date process.

- 3.2.4.2 For those services and circumstances that U S WEST and CO-PROVIDER agree shall be handled by the standard interval process, U S WEST shall supply CO-PROVIDER with standard due date intervals on a nondiscriminatory basis to be used by CO-PROVIDER personnel to determine service installation dates. Under those circumstances U S WEST shall complete the provisioning within the standard interval.

3.2.4.2.1 If CO-PROVIDER requests a due date earlier than the standard due date interval, then expedite charges may apply.

- 3.2.4.3 For those services and circumstances that U S WEST and CO-PROVIDER agree shall be handled by the requested/committed due date process, CO-PROVIDER may request a due date on each order. U S WEST will provide an offered due date on a nondiscriminatory basis. If CO-PROVIDER accepts the offered due date then such date shall become the committed due date. U S WEST will complete the order on the committed due date unless otherwise authorized by CO-PROVIDER.

3.2.4.3.1 If CO-PROVIDER requires a due date earlier than the U S WEST offered due date and U S WEST agrees to meet the CO-PROVIDER required due date, then that required due date becomes the committed due date and expedite charges may apply.

- 3.2.4.4 Subsequent to an initial order submission, CO-PROVIDER may request a new/revised due date that is earlier than the committed due date. If U S WEST agrees to meet that new/revised due date, then that new/revised due date becomes the committed due date and expedite charges may apply.

- 3.2.4.5 Any special or preferred scheduling options available, internally or externally, to U S WEST for ordering and provisioning services shall also be available to CO-PROVIDER.

### **3.2.5 Customer Premises Inspections and Installations**

- 3.2.5.1 CO-PROVIDER shall perform or contract for all needs assessments, including equipment and installation requirements, at the Customer premises.
- 3.2.5.2 U S WEST shall provide CO-PROVIDER with the ability to schedule dispatches for work under this Agreement.
- 3.2.5.3 U S WEST shall provide, at CO-PROVIDER's request, extended demarcation beyond the NID using intrabuilding riser and lateral beyond the NID. This provision shall not require U S WEST to provide inside wire.

### **3.2.6 Firm Order Confirmation (FOC)**

- 3.2.6.1 U S WEST shall provide to CO-PROVIDER, via an electronic interface, a Firm Order Confirmation ("FOC") for each CO-PROVIDER order. The FOC shall contain, on a per line and/or trunk basis, an enumeration of CO-

further analysis and financial transactions, except those resulting from an Audit. Closure shall take place within nine (9) months of the Bill Date. The month being closed represents those Connectivity Charges that were billed or should have been billed by the applicable bill date.

4.1.18.4 If the dispute is not resolved within the allotted time frame, the following resolution procedure shall begin:

4.1.18.4.1 If the dispute is not resolved within sixty (60) days of the Notice of Discrepancy, the dispute shall be escalated to the second level of management for resolution.

4.1.18.4.2 If the dispute is not resolved within ninety (90) days of Notice of Discrepancy, the dispute shall be escalated to the third level of management for resolution.

4.1.18.4.3 If the dispute is not resolved within one hundred and twenty (120) days of the Notice of Discrepancy, upon the written request of either Party within such one hundred and twenty (120) day period, the dispute may be resolved pursuant to the dispute resolution provision set forth in Part A of this Agreement.

4.1.19 U S WEST shall reimburse CO-PROVIDER for incorrect Connectivity Billing charges, including, without limitation, overcharges, services ordered or requested but not delivered, interrupted services, and services of poor quality and installation problems, if such problems are caused by U S WEST. Such reimbursements shall be set forth in the appropriate section of the Connectivity Bill pursuant to appropriate standards.

4.1.20 The Parties agree to record call information in accordance with this Section 4.1. To the extent technically feasible, each Party shall record all call detail information associated with every call that one Party bills to the other Party. CO-PROVIDER may request, through the Bona Fide Request process the recording of call records and/or call detail information that is not currently recorded by U S WEST. These records shall be provided and retained pursuant to Section 5 of this Attachment.

4.1.21 When CO-PROVIDER collocates with U S WEST in U S WEST's facility as described in this Agreement, capital expenditures (e.g., costs associated with building the "cage"), shall not be included in the Connectivity Bill provided to CO-PROVIDER pursuant to this Attachment 5. All such capital expenses shall be given a unique BAN and invoice number. All invoices for capital expenses shall be sent to the location specified by CO-PROVIDER for payment. All other non-capital recurring collocation expenses shall be billed to CO-PROVIDER in accordance with this Agreement. The CABS/SECABS Billing Output Specifications (BOS) documents provide the guidelines on how to bill the Connectivity Charges associated with collocation.

#### **4.1.22 Local Number Portability**

4.1.22.1 In accordance with the terms and conditions set forth in this Agreement, U S WEST shall record and provide to CO-PROVIDER all detail information associated with an alternately billed call to an CO-PROVIDER local exchange

#### **6.1.8 Text Messaging**

Allows textual communication between U S WEST and CO-PROVIDER personnel for the purpose of resolving the trouble. The messages are logged in the TR, thus the function can only be performed for TRs which were entered by the customer involved in the messaging. Specific uses of this messaging include allowing the customer to add descriptive information about the trouble, allowing U S WEST to request additional trouble information, and allowing U S WEST to implement the status window functionality through manual procedures.

#### **6.1.9 Trouble History**

Provides CO-PROVIDER with trouble history information currently retained on the circuit.

#### **6.1.10 Testing**

Notifies CO-PROVIDER of the results of initial or subsequent circuit tests for a TR previously opened by that customer.

### **6.2 General Requirements**

6.2.1 U S WEST shall provide repair, maintenance, testing, and surveillance for all Telecommunications Services and unbundled Network Elements and Combinations in accordance with the terms and conditions of this Agreement.

6.2.1.1 U S WEST shall provide CO-PROVIDER with the same level of maintenance support as U S WEST provides itself in accordance with standards and performance measurements that U S WEST uses and/or which are required by law, regulatory agency, or by U S WEST's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as U S WEST may deploy) that U S WEST provides to CO-PROVIDER under this Agreement.

6.2.1.2 U S WEST shall provide a SPOC (Single Point of Contact) for Residence, and a SPOC for Business for CO-PROVIDER to report via a toll free telephone number maintenance issues and trouble reports twenty four (24) hours a day and seven (7) days a week. The SPOC Residence toll free number, and SPOC Business toll free number, will be the numbers for all of U S WEST's fourteen (14) states.

6.2.1.3 U S WEST shall provide CO-PROVIDER maintenance dispatch personnel on the same schedule that it provides its own Customers.

6.2.2 CO-PROVIDER shall handle all interaction with CO-PROVIDER Customers including all calls regarding service problems, scheduling of technician visits, and notifying the Customer of trouble status and resolution. When a U S WEST



technician is on site, the customer will be statused in accordance with standard U S WEST procedures.

- 6.2.3 CO-PROVIDER and U S WEST will provide their respective customers with the correct telephone numbers to call for access to their respective repair bureaus.
- 6.2.4 Customers of CO-PROVIDER shall be instructed to report all cases of trouble to CO-PROVIDER. Customers of U S WEST shall be instructed to report all cases of trouble to U S WEST. CO-PROVIDER and U S WEST will provide their respective repair contact numbers to one another on a reciprocal basis.
- 6.2.5 U S WEST shall cooperate with CO-PROVIDER to meet maintenance standards for all Telecommunications Services, unbundled Network Elements and Combinations ordered under this Agreement. Such maintenance standards shall include, without limitation, standards for testing, network management, call gapping, and notification of upgrades as they become available.
- 6.2.6 All U S WEST employees or contractors who perform repair service for CO-PROVIDER Customers shall follow mutually agreed to procedures in all their communications with CO-PROVIDER Customers. At a minimum, these procedures, and protocols shall ensure that: (a) U S WEST employees or contractors shall perform repair service that is at least equal in quality to that provided to U S WEST Customers; and (b) trouble calls from CO-PROVIDER Customers shall receive response time priority that is at least equal to that of U S WEST Customers, regardless of whether the Customer is an CO-PROVIDER Customer or a U S WEST Customer.
- 6.2.7 In responding to repair calls, neither Party shall make disparaging remarks about each other, nor shall they use repair calls as the basis for internal referrals or to solicit customers to market services. Either Party may respond with accurate information in answering customer questions.
- 6.2.8 U S WEST shall perform scheduled maintenance, including, without limitation, required and recommended maintenance intervals and procedures, for all Telecommunications Services, Network Elements and Combinations provided to CO-PROVIDER under this Agreement equal in quality to that currently provided by U S WEST in the maintenance of its own network.
  - 6.2.8.1 U S WEST shall exercise its best efforts to provide the designated CO-PROVIDER SPOC at least sixty (60) days' advance notice of any scheduled activity which will likely impact CO-PROVIDER customers.
  - 6.2.8.2 Plans for significant service affecting activities shall include, at a minimum, the following information: location and type of facilities, specific work to be performed, date and time work is scheduled to commence, work schedule to be followed, date and time work is scheduled to be completed, and estimated number of work hours for completion. Examples of such activities include, but are not limited to, office conversions, cable facility rolls, and tandem re-homes.
- 6.2.9 U S WEST shall exercise its best efforts to notify CO-PROVIDER of all non-scheduled activities to be performed by U S WEST on any Network Element,

## **EXHIBIT 3**

### **EXPEDITE CAPABILITY FOR LOOPS**

This one-page chart is Exhibit DD-2 to Mr. Denney's Rebuttal (Hrg. Ex. E-4).

**EXPEDITE CAPABILITY FOR LOOPS – all Qwest states, except WA –  
IS EXPEDITE CAPABILITY PROVIDED FOR DSO, DSI, OR NEITHER?**

	<b>EARLIER</b>	<b>PCAT VERSION 11</b>	<b>PCAT VERSION 27</b>	<b>PCAT VERSION 30</b>
<b>Qwest-Eschelon ICA</b> Att. 5: Business Process Requirements: <i>all products</i>	“3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI	<i>No change:</i> “3.2.2.13 Expedites: [Qwest] shall provide [CLEC] the capability to expedite a service order.” – includes DSO & DSI
<b>CMP Document, §1.0</b> <b>(Scope of CMP)<sup>1</sup></b>	If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls	<i>No change:</i> If ICA & CMP/PCAT conflict, ICA controls
<b>Emergency-based</b> <b>“Requiring Approval”</b> <b>(no addt’l fee) –</b> <b>NO AMENDMENT</b>	DSO DSI	DSO DSI	DSO DSI	NEITHER (v.30 <i>removed</i> loops from emergency-based expedite capability)
<b>Emergency-based</b> <b>“Requiring Approval”</b> <b>(no addt’l fee) –</b> <b>W/ AMENDMENT</b>	No amendment at that time	DSO	NEITHER (v.27 <i>added</i> DSO to list of products eligible for fee- added expedite capability)	NEITHER
<b>Fee-added “Pre- Approved” (\$200 per day advanced)<sup>2</sup> –</b> <b>NO AMENDMENT</b>	NEITHER	NEITHER	NEITHER	NEITHER
<b>Fee-added “Pre- Approved” (\$200 per day advanced) –</b> <b>W/ AMENDMENT</b>	No amendment at that time	DSI	DSO DSI	DSO DSI

<sup>1</sup> “In cases of conflict between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, but would abridge or expand the rights of a party to such agreement, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.” Qwest CMP Document, §1.0 [AZ Complaint Exhibit BJJ A-9 (000173)] available at [http://www.qwest.com/wholesale/downloads/2006/061030/QwestWholesaleChangeManagementDocument\\_10\\_30\\_06.doc](http://www.qwest.com/wholesale/downloads/2006/061030/QwestWholesaleChangeManagementDocument_10_30_06.doc)

<sup>2</sup> 5 day interval for loops: If advanced 5 days, \$200 X 5 = \$1,000

## **EXHIBIT 4**

### **TABLE – STAFF RECOMMENDATIONS ARE WITHIN SCOPE OF COMPLAINT, DESPITE QWEST CLAIM THE CASE IS NARROWER**

This Table has two columns – the first contains quotations and citations from conclusions in Staff Testimony, and the second contains quotations and citations from Eschelon's Complaint.

**STAFF RECOMMENDATIONS ARE WITHIN SCOPE OF COMPLAINT,  
DESPITE QWEST CLAIM THE CASE IS NARROWER**

**QWEST THEME -- SINGLE ISSUE IS BREACH OF ICA FOR ONE CLEC<sup>1</sup>--**

Per Qwest: This case is limited to a breach of Eschelon's contract<sup>2</sup> involving a refusal to expedite an order for a rehabilitation center.<sup>3</sup> It no longer includes discrimination.<sup>4</sup> This case is not a dispute resolution to reverse Qwest's action toward CLECs in CMP,<sup>5</sup> and it does not seek relief applicable to other CLECs.<sup>6</sup>

**DOCUMENTED FACTS = COMPLAINT ITSELF, WHICH IS MUCH BROADER<sup>7</sup>**

This case continues to address contractual and statutory claims,<sup>8</sup> including discrimination. Eschelon agrees with the Staff recommendations in its Executive Summary, and those recommendations are consistent with the relief sought by Eschelon in this case.<sup>9</sup> This is not a situation in which Staff later initiated recommendations that were not made in the Complaint and were only agreed to later by Eschelon.<sup>10</sup> This case is expressly a dispute resolution to reverse Qwest's non-mutual conduct toward CLECs in CMP.<sup>11</sup> (*See the Table below showing examples of where each Staff conclusion is supported within the Complaint.*)

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<sup>1</sup> See, e.g., Qwest (Mr. Steese), Tr. Vol. 1, p. 165, line 23 – p. 166, line 3 (“This case presents one issue for this court to decide, and that issue is this: Did Qwest breach the very specific terms of its interconnection agreement with Eschelon by modifying and adhering to a process for expediting orders for unbundled loops that was created in change management. That is the issue.”)

<sup>2</sup> See *id.*

<sup>3</sup> See, e.g., Qwest (Mr. Steese), Tr. Vol. 1, p. 167, line 21 – p. 168, line 22.

<sup>4</sup> See, e.g., Qwest (Mr. Steese), Tr. Vol. 1, p. 166, lines 12-19.

<sup>5</sup> See, e.g., Qwest (Mr. Steese), Tr. Vol. 1, p. 38, lines 4-7.

<sup>6</sup> See *id.*

<sup>7</sup> The Complaint encompasses the relief requested by Eschelon and Staff, particularly given that all that is required in Arizona is notice pleading. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216, 1229 (Az Ct. App. June 28, 2007) (“In a notice-pleading state, such as Arizona, ‘a complaint need only have a statement of the ground upon which the court’s jurisdiction depends, a statement of the claim showing that the pleader is entitled to relief and a demand for judgment.’”); *Drew v. United Producers and Consumers Cooperative*, 161 Ariz. 331, 778 P.2d 1227 (Ariz. 1989) (construing claim for “damages” broadly, to include claim for lost profits as well as claim for property damage); *Rosenberg v. Rosenberg*, 123 Ariz. 589, 601 P.2d 589, 592-93 (Ariz. 1979) (holding that where claim was for lump sum due under a divorce decree, award of unpaid child support and past medical expenses was not beyond the scope of the complaint and stating, “Arizona is a notice pleading state, and therefore does not require extensive fact pleading. We feel that plaintiff’s complaint sufficiently placed defendant on notice of the relief sought.”) (citation omitted).

<sup>8</sup> See, e.g., Complaint, p. 1, line 13; p. 3, lines 23-25; pp. 13-14 (Relief Requested).

<sup>9</sup> Tr. Vol. 1, p. 129, lines 11-15 (Denney); Hrg. Ex. E-4 (Denney Reb.), p. 4, line 14 – p. 8, line 2.

<sup>10</sup> Tr. Vol. 1, p. 164, lines 8-22 (Denney).

<sup>11</sup> Complaint, page 1, lines 16-21 & ¶¶9-21, including discussion of the PCAT Version 27 and 30 “notices to CLECs” in ¶¶14-15. *See also* Tr. Vol. 1, p. 38, lines 4-5 (Johnson); Hrg. Ex. E-1 at A-7, p. 000137 (April 3, 2006 Escalation and Dispute Resolution letter identifying, in addition to the ICA, both the joint McLeod/Eschelon escalation of PCAT Version 27 and Eschelon’s objections to PCAT Version 30 as subject of this dispute which, if not resolved, would be brought to the Commission in this case). Eschelon’s objections to Version 30 were not limited to Eschelon but also applied to other CLECs. *See, e.g., id.* at A-7, p. 000124 (“Qwest is now failing to keep the commitments it made to CLECs in CMP . . . by now changing its position on expedites and unilaterally imposing charges via a process change in CMP.”) & 000125 (“The change Qwest is

**TABLE -- STAFF CONCLUSIONS ARE CONSISTENT WITH COMPLAINT AND  
THE RELIEF SOUGHT IN THE COMPLAINT**

Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
1	<b><u>Breach of ICA:</u></b> “Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement, which allows Eschelon the ability to expedite orders, when Qwest denied this option without Eschelon signing an amendment to the Agreement.” (Staff Conclusion #1, 1 <sup>st</sup> sentence, Staff Executive Summary)	RELIEF REQUESTED, ¶A, Page 13, lines 7-8.  See also Page 1, lines 14-21: “Qwest has refused to provide . . . the capability to expedite orders for unbundled loops under the . . . expedite language of the Qwest-Eschelon Interconnection Agreement (“ICA”) approved by this Commission. Qwest, which previously provided such expedite capability pursuant to the same ICA, suddenly refuses to provide such expedited orders unless Eschelon signs an amendment that both (i) alters Eschelon’s right to expedite loop orders under the Parties’ approved ICA and (ii) imposes a higher charge to expedite loop orders that is contrary to the ICA . . .”
2	<b><u>Continue to offer emergency-based expedites at no additional charge:</u></b> “Qwest should continue to support the same Expedite Process that has been used in the past for all products and services (including unbundled loops) if the order meets any of the Emergency criteria or conditions or where the customer’s safety may be an issue if the Expedite is not processed. No additional charge should be applied beyond the standard installation charge.” (Staff	<b><u>As to Eschelon ICA</u></b> - RELIEF REQUESTED, ¶I, Page 14, lines 1-3: “An order enforcing the Commission approved ICA to require Qwest to provide such expedite capability at Commission approved rates <i>and, when applicable outage and Emergency conditions exist, at no additional charge.</i> ”  <b><u>As to other CLECs</u></b> - RELIEF REQUESTED in Paragraphs C, D, E, F & K (pp. 13-14); ¶21, Page 8, lines 13-20; <sup>12</sup> ¶4, Page 3, lines 22-25. If the Commission finds that Qwest’s conduct in implementing and enforcing the changes described in the Complaint violated the public interest and/or state or federal law, as alleged by Eschelon in its Complaint ( <i>see id.</i> ), Qwest could not continue conduct as to any CLEC that is in violation of

proposing is discriminatory to CLECs and their customers.”) & 000126 (“Qwest’s further change, significantly impacts a CLEC’s business”).

<sup>12</sup> Eschelon alleges that Qwest’s “implementing and enforcing” the “changes described herein” violates state and federal law. *See id.* The changes described in the Complaint include Qwest’s Version 27 & 30 PCAT changes applicable to CLECs (see, e.g. Complaint, ¶¶14-15, p. 6, line 14 – p. 7, line 7), as well as “Qwest’s Amendment” (see, e.g., *id.*, ¶D, p. 8, line 12) to “existing ICAs” (plural) (see, *id.* p. 7, line 1) and Qwest’s conduct in using CMP to require CLECs to sign an amendment with a per day rate, even though Qwest had not submitted any per day rate to the Commission for approval (see, e.g., *id.* p. 7, lines 3-12).

Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
	Conclusion #1, 2 <sup>nd</sup> and 3 <sup>rd</sup> sentences, Staff Executive Summary)	<p>public policy, illegal, discriminatory, and/or otherwise in violation of a Commission order.<sup>13</sup></p> <p>See also ¶12, p. 6, lines 14-16: “Together, these provisions of the ICA, CMP Document, PCAT notices, and SGAT collectively show a regulatory regime designed to ensure that Qwest cannot undermine Commission approved ICA terms by unilaterally altering them through its own PCAT.”</p> <p>See also ¶13, p. 6, lines 17-18 and footnote 1: “Its actions here, for example, are similar to those rejected by this Commission in the 271 proceeding. Qwest is on notice through these documents and that proceeding that it should not have implemented such a change without first seeking Commission approval. See, In re. US West Communication Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, ACC Docket No. T-00000A-97-0238, Decision No. 66242, ¶109 (Sept. 16, 2003).”</p>
3	<p><b><u>Provide expedites for a fee (fee-added) when emergency conditions are not met:</u></b></p> <p>“Qwest should continue with the enhancement to the Expedites &amp; Escalations Overview Process, <i>as originally requested by Covad</i>,<sup>[14]</sup> offering an option to CLECs to expedite orders when the situation does not meet the emergency criteria or conditions.<sup>[15]</sup> This option</p>	<p>RELIEF REQUESTED, ¶I, p. 14, lines 1-2 (“to require Qwest to provide such capability to expedite orders at Commission approved rates”); RELIEF REQUESTED ¶E, p. 13, lines 18-20; ¶21, lines 13-20 (Qwest provides expedites to its retail customers, so Qwest should provide expedites to CLECs.)</p> <p>See also ¶38, p. 12, lines 3-5: “If . . . additional work were required and applied on a nondiscriminatory basis, the ICA provides that charges may apply. [See ICA Excerpts, Att. 5, Section 3.2.4.2.1 at Exhibit 1].”<sup>17</sup></p>

<sup>13</sup> See ¶42, Page 13, lines 1-3: Conduct that violates state and federal law and the public interest “denies Eschelon *and other CLECs* a meaningful opportunity to complete.”

<sup>14</sup> Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 1-9. See, eg., the title (“Enhancement to Existing Process for Provisioning” and description of Covad’s requested change (“Covad requests that Qwest provide a formal process to expedite an order that requires an Interval that is shorter than what is currently available for the product.”) *Id.* at 1. See also Hrg. Ex. E-2 (Johnson Reb. p. 5, lines 6-9 & p. 8, lines 3-11, FN 16. See also Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 7(emphasis added) – CMP minutes, stating: “Jill Martain advised there would be charges in the ICA, and the amendment would have to be written. *Bonnie said they would have to be commission approved rates.* Jill advised she is not the expert on this process but she believes so.”

<sup>15</sup> Regarding what Qwest implemented, *compare* Hrg. Ex. E-1 at Att. B, p. Q000006 (earlier 2004 Qwest-AT&T expedite amendment) *with* Hrg. Ex. E-1 at Att. B, p. Q000010 (later 2006 Qwest-MTI expedite amendment providing in ¶9.1.15.2 that the request for expedite of a UNE order will be allowed “only” when the

Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
	should be offered to all CLECs via an amendment <sup>16]</sup> to the CLEC's current Interconnection Agreement and may involve a charge when the option is utilized by the CLEC." (Staff Conclusion #2, Staff Executive Summary)	See also ¶16, p. 7, lines 8-16: The Commission has approved rates that are structured as hourly and non-recurring charges that Qwest may apply. <sup>18</sup>  See also Exhibit 1, p. 3, §1.2 of the ICA: "nothing in this Agreement shall prevent a Party <i>through the dispute resolution process described in this Agreement</i> from seeking to recover the costs and expenses, if any, it may incur . . . ."
4	<b><u>Pay \$1,800 for Customer</u></b> <b><u>Example:</u></b> "The Qwest-Eschelon Interconnection Agreement does allow Qwest the ability to impose a fee on Eschelon for expediting orders. Until recently, common practice has been that Qwest has chosen not to charge an additional expedite fee for all products/services that met certain emergency conditions/criteria. Qwest should reimburse the additional \$1800 plus interest (if applicable) that was charged to Eschelon in this particular Complaint." (Staff Conclusion #3, Staff Executive Summary)	RELIEF REQUESTED, ¶J, Page 14, lines 4-7: "An order, with respect to the Customer incident, requiring Qwest to refund Eschelon any over-charges and considering, in determining that amount, that if Qwest had applied the Emergency criteria that it applied to past loop orders under the ICA, Eschelon would have paid no additional charge because the Customer incident met those Emergency conditions."  RELIEF REQUESTED, ¶I, Page 14, lines 1-3: "An order enforcing the Commission approved ICA to require Qwest to provide such expedite capability at Commission approved rates and, when applicable outage and Emergency conditions exist, at no additional charge."  ¶37, page 11, lines 19-21: \$1,800

PCAT criteria for the fee-added expedite process are met), using "Language from (1-31-06) Negotiations Template." Note that, regardless of which of these amendments a CLEC had signed or whether CLEC had no expedite amendment, Qwest enforced its Version 27 and 30 PCAT changes against all CLECs by requiring another amendment, with a per day fee – under threat of rejecting expedite requests if not signed. See Complaint, ¶¶14-15, pp. 6-7.

<sup>16</sup> Regarding other CLECs' ICAs, Staff Testimony indicated that some do not have expedite terms, or have a different rate (see Staff Testimony, p. 25, lines 8-18), so for some CLECs, an amendment may be required. If the current Commission-approved Individual Case Basis (ICB) rate is used (see Exhibit 5 to Eschelon Brief, Row 36), an amendment to Eschelon's ICA would not be needed, as the ICA already allows Qwest to charge Commission-approved rates for expedites. If the Commission adopts another approach using Commission approved rates in this proceeding (*see id.*, alternative proposal) or an interim rate, such a rate could be implemented either under Eschelon's current ICA or through an ICA amendment.

<sup>17</sup> Exhibit 1 to the Complaint is entitled "ICA Provisions – Arizona." It is also Exhibit 1 to Eschelon's Brief.

<sup>18</sup> In other words, applicable Commission-approved rates may be applied on an Individual Case Basis (ICB).



Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
5	<b><u>Training:</u></b> “Due to the nature of this particular Complaint which stemmed from an Eschelon caused error in disconnection of an incorrect number, Eschelon should implement a training or refresher training program for its representatives stressing the importance of accuracy when ordering changes to their customer’s service in order to try to avoid or minimize unnecessary customer service outages.” (Staff Conclusion #4, Staff Executive Summary)	¶26, page 9, lines 16-20: Eschelon admitted its disconnect in error in the Complaint. <sup>19</sup>
6	<b><u>Definition of Designed and Non-Designed Services:</u></b> “Qwest should include a definition of designed and non-designed services in its Arizona tariffs.” (Staff Conclusion #5, Staff Executive Summary)	RELIEF REQUESTED, ¶K, Page 14, line 8.  See also ¶¶14-15, p. 6, line 14 – p. 7, line 7 (identifying Version 27 and 30 changes, which Qwest now attributes to a distinction between designed and non-designed services)
7	<b><u>ICA Negotiations:</u></b> “Qwest and the CLECs should include expedites of the installation of Unbundled Loops in their Interconnection Agreement negotiations.” (Staff Conclusion #6, Staff Executive Summary)	RELIEF REQUESTED, ¶K, Page 14, line 8  See also paragraphs of Complaint cited in <i>Row 2 above</i> regarding other CLECs
8	<b><u>Performance Measurement:</u></b> “Staff recommends that a performance measurement for expedites of Unbundled Loops be developed through CMP . . . .” (Staff Conclusion #7, Staff Executive Summary)	RELIEF REQUESTED, ¶K, Page 14, line 8;  See also paragraphs of Complaint cited in <i>Row 2 above</i> regarding other CLECs  See also ¶41, p. 12, line 27: “service problem”
9	<b><u>TELRIC Rate in Cost Docket, Phase III:</u></b> “Staff recommends . . . that	RELIEF REQUESTED, ¶I, p. 14, lines 1-2 (“to require Qwest to provide such capability to expedite orders at Commission approved rates”);

<sup>19</sup> Since then, Eschelon has instituted training and informed Staff of this. See Hrg. Ex. E-4 (Denney Rebuttal), p. 5, line 5 – p. 6, line 2.

Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
	<p>the rate(s) for expedites be considered as part of the next cost docket.” (Staff Conclusion #7, Staff Executive Summary.) Qwest should be required to develop a cost-based rate for expedites in Phase III. (Tr. Vol. I, p. 155, lines 20-23.)<sup>20</sup></p>	<p>RELIEF REQUESTED, ¶K, Page 14, line 8.</p> <p>Rates should be approved by the Commission and new or increased rates should not be imposed without first seeking Commission approval. See Page 1, line lines 20-21; Page 2, lines 21-22&amp; 26-27; Page 3, lines 1-4; ¶¶15-16, p. 7, lines 6-12; ¶37, p. 11, line 21; ¶38, p. 11, line 22 – p. 12, line 10.</p>
10	<p><b><u>Expedite Then Dispute:</u></b> “Qwest should have expedited the request first and then followed up afterwards with the dispute resolution process. Clearly, [Named Customer] should have been thought of first; especially given the nature of the customer’s business.” (Staff Testimony, p. 34, lines 19-21.)</p>	<p>RELIEF REQUESTED, ¶B, p. 13, lines 9-12: “A finding that by refusing to provide the capability to expedite unbundled loop orders pursuant to the Commission approved ICA, Qwest is engaging in a self-help remedy in violation of the Qwest-Eschelon ICA, including the billing and dispute resolution provisions.”</p> <p>See also Page 2, lines 10-13; ¶7, p. 4, lines 14-16; ¶11A, p. 5, lines 14-17; ¶13, p. 4, lines 17-18 &amp; FN 1; ¶20, p. 8, lines 19-11; ¶35, p. 11, lines 9-12.</p>
	<p><b><u>Forcing CLECs to sign amendment:</u></b> Staff has indicated that “CLECs should not be forced into signing” Qwest’s expedite amendment. (Staff Testimony, p. 34, lines 10-11.) Staff added that “since CLEC interconnection agreements are voluntarily negotiated or arbitrated,” Qwest could have taken the issue to arbitration under the Qwest-Eschelon ICA, “rather than trying to force Eschelon into signing an amendment.” (<i>Id.</i> p. 36, line 21 – p. 37, line 2).</p>	<p>RELIEF REQUESTED, ¶D, p. 13, lines 16-17 ; ¶E, p. 13, lines 18-20 (both referring to Qwest’s “implementing and <i>enforcing</i> changes” against CLECs).</p> <p>“The SGAT provides that ‘Qwest agrees that CLEC shall not be held to the requirements of the PCAT.’” (p. 5, lines 22-24) Yet, Qwest is forcing CLECs to adhere to the PCAT requirement to sign an amendment with a per day fee before Qwest will provide expedite capability for UNE orders. (¶¶13-17.)</p> <p>Withholding service forces CLECs needing expedited UNE orders to sign the amendment. Qwest enforced its PCAT changes by implementing a change over multiple CLEC objection that requires all CLECs desiring expedited UNE orders to sign an amendment with</p>

<sup>20</sup> See MN Arbitrators’ Report, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2007) ¶222 (“A TELRIC study should be done.”); see also MN Order Resolving Arbitration Issues (same MPUC docket; Mar. 30, 2007), pp. 17-19 (affirming and concluding that, instead of opening a new docket to establish the appropriate rate, the matter should be referred to the cost docket already underway). Thus, Qwest has developed a cost study, which it filed in the UNE cost case in Minnesota. See Tr. Vol. 1, p. 156, lines 17-22.

Row#	STAFF CONCLUSION	COMPLAINT – citations to examples
		<p>a per day fee, when the Commission has approved no per day fee, on the premise that Qwest will refuse to provide the capability it previously provided without that amendment. See Page 1, lines 17-21; Page 2, lines 17-25; Page 3, lines 3-4; ¶¶13-17.</p>

## **EXHIBIT 5**

### **TABLE – QWEST’S CURRENT THEMES: A REVIEW IN LIGHT OF THE EVIDENCE**

The first page of this Exhibit is an Index to Qwest’s themes by Row Number to provide a guide in finding information in the Table. This Table has two columns – The first column contains Qwest quotations and citations, including Qwest’s entire Opening Statement at the hearing, when Qwest summarized its current themes in this case. The second column contains Eschelon’s reply in light of the evidence, with quotations and citations from the record.

# QWEST'S CURRENT THEMES: A REVIEW IN LIGHT OF THE EVIDENCE

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#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
1	<p><b>Scope of Case:</b> “This case presents <i>one issue</i> for this court to decide, and that issue is this: Did Qwest breach the very specific terms of its interconnection agreement with Eschelon by modifying and adhering to a process for expediting orders for unbundled loops that was created in change management. That is the issue.” (Tr., Vol. I, p. 165, ln 23 – p. 166, ln 3, Mr. Steese opening). . .</p> <p>“So in conclusion, Your Honor, when you look at what we have, we have a claim for breach of contract, when in reality it's a request for this Commission to <i>sanction the ability of Eschelon to gain a competitive advantage not only over Qwest, but over every CLEC</i> that has signed an amendment agreeing to pay \$200 per day to expedite. And that is not what their contract allows.” (Tr. Vol. I, p. 178, ln 23-p.179, ln 4, Mr. Steese opening)</p>	<p>See Complaint (multiple claims &amp; requests)  See also Exhibit 4 to Eschelon Brief (“Staff Recommendations are Within Scope of Complaint, Despite Qwest Claim the Case is Narrower”);  See also Rows 5-6 below</p> <p>“Qwest should continue with the enhancement to the Expedites &amp; Escalations Overview Process, <i>as originally requested</i> by Covad, offering an <i>option</i> to CLECs to expedite orders when the situation does not meet the emergency criteria or conditions. This option should be <i>offered to all CLECs</i> via an amendment to the CLEC’s current Interconnection Agreement and may involve a charge when the option is utilized by the CLEC.” (Staff Conclusion #2, Staff Executive Summary). This is consistent with Eschelon’s requests. See Ex. 4 to Brief.</p>
2	<p><b>Breach of Contract:</b> “Now, Eschelon claims a breach occurred, and Qwest submits that the facts and the plain language of the contract show that there's been no breach.” (Tr., Vol. I, p. 166, lns 4-6, Mr. Steese opening) . . .</p> <p>“Every single thing Qwest has done is wholly consistent with this plain language of the contract.” (Tr., Vol. I, p. 171, lns 21-23, Mr. Steese opening); see also <i>id.</i> p. 173, lns 9-12.</p>	<p>“Qwest did not adhere to the terms and conditions of the current Qwest-Eschelon Interconnection Agreement, which allows Eschelon the ability to expedite orders, when Qwest denied this option without Eschelon signing an amendment to the Agreement.” (Hrg. Ex. S-1, Staff Conclusion #1, 1<sup>st</sup> sentence, Staff Executive Summary)</p>
3	<p><b>Course of Dealing:</b> “And the evidence is also going to show through Qwest's witnesses that the parties' course of dealing consistently and routinely has been to use the processes in change</p>	<p>“No course of dealing or failure of either Party to strictly enforce any term, right, or condition of this Agreement in any instance shall be construed as a general waiver or relinquishment of such term, right, or condition.” (Qwest-</p>

<sup>1</sup> ICA Att. 5, ¶3.2.2.13 mandates (“shall provide”) the provision of expedite capability. Part A, ¶34.2 clearly shows that Eschelon has not waived or relinquished that right. In contrast, Qwest has pointed to no term, right, or condition of the ICA that mandates that Qwest must charge for expedites when the emergency conditions are met. (See Row 37.) Qwest acknowledges that the ICA does not provide expedite charges “will”

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	management to implement the terms of the interconnection agreement.” (Tr., Vol. I, p. 166, lns 6-11, Mr. Steese opening); <i>see also id.</i> p. 168, lns 2-4 & p. 171, lns 24-25 & p. 175, lns 1-12.	Eschelon ICA, Part A, ¶34.2.) <sup>1</sup>
4	<p><b><u>Where/How Change Developed:</u></b></p> <p>“Now, the evidence is that change management is where parties went to develop the process. Qwest couldn't develop a process on its own. Eschelon couldn't either. It <i>had to go</i> to change management to mutually develop the process.” (Tr., Vol. I, p. 170, lns 5-9, Mr. Steese opening) . . .</p> <p>“Indeed, Ms. Johnson said that very thing.” (Tr., Vol. I, p. 166, ln 11, Mr. Steese opening) . . .</p> <p>“Did <i>Qwest</i> have a place where expedite procedures would be mutually</p>	<p>The ICA provides that the Commission is where Qwest should go to seek a change for the “imposition of”<sup>2</sup> a fee before implementing it. <i>See</i> ICA Att. 1, §1.2 (at p. 3 of Exhibit 1 to the Complaint): “nothing in this Agreement shall prevent a Party <i>through the dispute resolution process described in this Agreement</i> from seeking to recover the costs and expenses, if any, it may incur . . . .” The dispute resolution process described in the Agreement provides, at Part A, ¶27.2, that “in the event [CLEC] and [Qwest] are unable to agree on certain items during the term of this Agreement” the parties may bring the issue <i>to this Commission</i>. <i>Id.</i> at p. 3.</p> <p>In the Qwest 271 case, the Commission made clear that Qwest should not unilaterally charge CLECs rates before Qwest has separately filed cost support for prior review and approval.<sup>3</sup></p> <p>Ms. Johnson actually said that the ICA allowed other means of implementing ICA terms that would be mutual (see quotes below), but Qwest instead forces CLECs to use CMP only,<sup>4</sup> where terms were not always mutual,<sup>5</sup> were implemented over CLEC objection,<sup>6</sup> and may</p>

apply and that they may not apply. (Tr., Vol., II, p. 229, lne 19 – p. 230, ln 4, Albersheim.) Staff referred to the course of dealing by the parties for several years under the ICA during which Qwest provided emergency-based expedites for UNEs at no additional charge. (Tr. Vol. II, p. 268, ln 11 – p. 270, ln 23.) Ms. Albersheim admitted that there was a course of dealing with respect to expedites that Qwest and Eschelon operated under with respect to the expedite term of the ICA. (*See id.* p. 270, lns 16-21.)

<sup>2</sup> “The change at issue here is the *imposition of the fee* to expedite orders for design services.” (Tr. Vol. I, p. 191, lns 16-17, Albersheim).

<sup>3</sup> Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (adopting recommendations of Staff) at ¶108, lines 18-19.

<sup>4</sup> Tr., Vol. I, p. 61, line 14, Johnson; *Id.* p. 63, lns 12-13 & 20-21 & 23.

<sup>5</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 17, lns 14-16.

<sup>6</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 17, ln 14 – p. 18, ln 2; p. 25, lines 2-6; see also Hrg. Ex. E-2 (Johnson Reb.) at BJJ-K (Summary of Eschelon Objections and Dispute Resolution).

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	developed? Answer, yes, change management.” (Tr., Vol. I, p. 171, lns 1-3, Mr. Steese opening); <i>see also id.</i> p. 171 ln 25 – p. 172, ln 6; p. 179, lns 4-6; p. 173 lns 16-21; p. 174, lns 18-25; p. 175, lns 1-12.	violate the ICA, <sup>7</sup> even though the CMP document says the ICA is supposed to control. <sup>8</sup>  <i>See</i> Tr., Vol. I, p. 32, lns 16-20, Johnson (“Qwest requires us as CLECs to do that, though our existing interconnection agreement says a mutually developed process and it does not specify where that needs to happen. But yes, that is Qwest's requirement that we go through CMP.”); <i>Id.</i> p. 61, lns 6-8, (“That's the place Qwest says, but that's not what this says. It doesn't say change management anywhere here.”).
5	<b><u>Discrimination Claim Status:</u></b> “Now, before going through the evidence on the contract, it's important to digress for just one small moment and dispel one point. And that is, initially Eschelon's complaint actually had two claims, one for breach of contract and one for discrimination.” (Tr., Vol. I, p. 166, lns 12-16, Mr. Steese opening); <i>see also id.</i> p. 167, lns 19-21	The Complaint continues to allege its multiple claims, including violation of public policy, anti-competitive conduct, and discrimination (including its request for nondiscriminatory, cost-based rates), <sup>9</sup> and at no point has Eschelon withdrawn these claims. Even if Eschelon had not discussed discrimination at the hearing (see next Row, #6), there is no requirement that a party repeat all of its claims during the hearing, when those claims are clearly in the record through extensive pre-filed testimony. <sup>10</sup>
6	<b><u>Discrimination – At Hearing:</u></b> “And we just got done hearing their witnesses, and we didn't hear a single person talk about discrimination. And that's because of the following facts.” (Tr., Vol. I, p. 166, lns 16-19, Mr. Steese opening)	At the hearing, before Mr. Steese's opening, Mr. Denney actually talked about discrimination (including the need for nondiscriminatory, cost-based rates) in his summary and in response to cross by Staff. ( <i>Summary:</i> Tr. Vol. I, p. 127, ln 21 – p. 128, ln 2; p. 128, lns 11-12; p. 128, ln 10 – p. 129, ln 10; <i>Cross by Staff:</i> <i>Id.</i> p. 150, lns 1-24; p. 152, ln 25 – p. 153, ln 15) <sup>11</sup>

<sup>7</sup> Hrg. Ex. E-1 (Johnson Dir.), p. 19, ln 16 – p. 20, ln 8.

<sup>8</sup> Tr., Vol. I, p. 22, lns 6-8, Johnson; Hrg. Ex. 2 (Johnson Reb.), p. 22, lns 17-18 (quoting Qwest CMP Document, §1.0 [Hrg. Ex. E-1 at BJJ A-9 (000173)]).

<sup>9</sup> See Exhibit 4 to Eschelon Brief; see, e.g., Complaint, p. 1, lines 11-26; p. 3, lines 23-25; ¶21, p. 8, lines 12-20; ¶¶D-F, p. 13, lines 16-22; ¶I, p.14, lns 1-3; ¶K, p.14, ln 8.

<sup>10</sup> See, e.g., Hr. Ex. E-3 (Web./Denney Dir.), p. 7, ln 9 – p. 8, ln 14; p. 22, lns 1-3; p. 24, lns 6-10, p. 25, ln 1- p. 46, line 6. Hrg. Ex. E-4 (Denney Reb.), p. 25, ln 11 – p. 26, ln 7; p. 28, ln 24 – p. 29 ln 8 (quoting Complaint, p. 2 ln 17 – p. 3, ln 6); p. 42, ln 7 – p. 69, ln 15. Hrg. Ex. E-2 (BJJ Reb.), p. 6, FN 9; p. 19, FN 58.

<sup>11</sup> See also: “The issue is not whether a term (*e.g.*, “expedite”) is itemized on the minimum list of “UNEs”; *the issue is nondiscriminatory access to UNEs.* In ¶268 of its *First Report and Order*, the FCC found that the requirement to provide ‘access’ to UNEs must be read broadly, concluding that the Act requires that UNEs ‘be provisioned in a way that would make them useful.’ Expedites are needed to make UNEs useful. *Nondiscriminatory access to UNEs must be provided at cost-based rates.*” From Hrg. Ex. E-4 (Denney Reb.), p. 44, lines 9-15 (citations omitted; emphasis added).



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7	<b>Number of expedite processes:</b> “Qwest has two processes for expediting orders. You have heard the names now.” (Tr., Vol. I, p. 166, lns 20-22, Mr. Steese opening)	The evidence showed Qwest Retail currently has at least three circumstances when expedites are offered to its retail customers: (1) expedites in emergencies at no additional charge (not in tariff but provided in practice); <sup>12</sup> (2) expedites without reason for a retail rate; <sup>13</sup> and (3) tariff waiver of expedite non-recurring charge (NRC) in certain scenarios for its retail customers. <sup>14</sup>
8	<b>Emergency-based expedites – whether POTS only, consistently:</b> “The first is the expedite requiring approval process, what is otherwise known as the emergency conditions process, and that is the process Qwest consistently utilizes to expedite orders for POTS services. If one wants a POTS order expedited, it has to meet one of these emergency conditions such as a medical emergency. And so long as Qwest has manpower available, it will expedite that order at no additional charge. And it's undisputed at this point, I believe, that Qwest consistently uses this process for POTS orders for retail customers and for	Qwest's claim that it “consistently” provides expedites in emergencies at no additional charge for only POTS orders (i.e., not UNE loops) <sup>15</sup> is contrary to the evidence that for almost six years Qwest provided (without an amendment) expedite capability in emergency-type situations for DS0 and DS1 capable loops and also (with an amendment) from Version 11 through Version 27 or 30 for at least DS0 loops, both for no additional charge. (Hrg. Ex. E-4, Denney Reb., at DD-2, Rows 3& 4.)  Qwest – inconsistent with that history – later changed the emergency-based terms over CLEC objection to apply only to POTS orders and thus to exclude expedite capability for all

<sup>12</sup> The emergency conditions are not documented in Qwest's tariffs. See Tr. Vol. II, p. 353, line 22 – p. 354, line 22; Id., p. 358 line 19 – p. 359, line 8 (Martain).

<sup>13</sup> At all relevant times, Qwest's retail tariffs have made fee-added expedites available to Qwest's retail customers, although the retail rate increased to \$200 per day from a cap of no more than 50% of the NRC to \$200 per day in 2004. See Tr. Vol. I, p. 152, ln 25 – p. 153, ln 15. In contrast, Qwest did not make fee-added expedites available to CLECs until 2004, and then they were available only at a retail rate with an amendment. See Hrg. Ex. E-1, A, at 000005 – 000007. Version 11 was effective on July 31, 2004. See Hrg. Ex. E-1, A-2 at 000066.

<sup>14</sup> Compare Qwest retail tariff, described in Hrg. Ex. Q-3 (Martain Direct), p. 40, lines 4-10 (emphasis added): “The tariff then goes on to state that if the end user elects to move service to a temporary location (either within the same building, or a different building) that non-recurring charges would apply. ***This would include the non recurring charge to expedite a design service.*** However, when the customer moves its service, via a service order, back to the original premise location, if it meets the criteria as outlined in 3.2.2.d included below, ***the non-recurring charges would be waived (including the expedite fee).***” with Qwest position that CLECs must pay an additional expedite fee, which is not waived, for design services, described at, e.g., Hrg. Ex. Q-1 (Albersheim Dir.), p. 14, lns 7-10.

<sup>15</sup> The terms “design” and “non-design” are not defined in the ICA. See Tr. Vol. II, p. 223, lines 5-8; Hrg. Ex. S-1 (Staff Testimony), p. 23, lines 17-21. Qwest's application of the terms can be something of a moving target. For example, Qwest claims that emergency-based expedites apply only to POTS services, but when Qwest first placed DS1 capable loops (which can be used to provide POTS) on the product list for fee-added expedites, Qwest did not place DS0 loops on that list. See Row #3, Exhibit DD-2 to Hrg. Ex. E-4 (Denney Reb.) (attached as **Exhibit 3** to this Brief). For purposes of discussion only, Eschelon will refer to unbundled loops as design services. Even assuming unbundled loops (DS0, DS1 and higher) are designed services, CLECs are entitled to the relief sought in the Complaint.

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	POTS orders for CLECs.” (Tr., Vol. I, p. 166, ln 21 – p. 167, ln 6, Mr. Steese opening) . . . “For POTS services, we are telling you in advance that we will only consider expediting an order if one of these following specifically delineated emergency conditions exist. And if they don't, we're going to reject the order.” (Tr., Vol. I, p. 169, lns 5-9, Mr. Steese opening)	UNE loop orders (DSO, DS1 and above). (See, e.g., McLeod & Integra comments on Versions 27 & 30 at Hrg. Ex. E-1, A-7 at 000123-124, 000127-000128.)
9	<b><u>Fee-added expedites - whether applied to retail &amp; CLECs, consistently:</u></b> “The second process that we have heard about started in Version 11 of change management, and it's called the preapproved expedites process. And this is the process Qwest uses to expedite orders for design services. And unbundled loops of all types are design services, as this Commission and every commission in Qwest's 14 states has found. And the rate that Qwest applies for that – you have heard this, too – is \$200 per day. At this point I believe it's undisputed that Qwest uses consistently this preapproved process to expedite orders for all design services whether for Qwest retail customers or for CLECs.” (Tr., Vol. I, p. 167, lns 7-18, Mr. Steese opening) . . .	Qwest's claim that it “consistently” provides expedite capability for design services for a fee “whether for Qwest retail customers or for CLECs” was not true at all during the first years of the ICA term, from 2000 through June of 2004, when Qwest offered expedites for design services to its retail customers (at a rate of no more than 50% of the NRC) but not at all for CLECs. <sup>16</sup> It is also an inaccurate statement today, when Qwest provides certain exceptions to charging for its retail customers with design services, but not CLECs. <sup>17</sup>  It is undisputed that <i>today</i> Qwest conditions receipt of expedite capability for design services for wholesale CLEC customers on execution of an amendment that contains, instead of the Commission approved Individual Case Basis (ICB) rate, <sup>18</sup> a retail rate of \$200. Eschelon disagrees that charging wholesale customers a retail rate is appropriate. <sup>19</sup> (See Row 35.)
10	<b><u>Purpose of Amendment/Versions 27 &amp; 30 - \$200 per day:</u></b> “But what did change management do with Versions 27 and 30? Qwest told the CLEC community uniformly, if you don't agree to pay a certain fee, \$200 per day per expedite, we're going to reject the order.	Qwest conceded that the purpose of its Version 27 and 30 PCAT changes was to impose a fee in the amount of \$200 per day. Qwest also admitted, however, that “rates are outside the scope of CMP.” (Hrg. Ex. Q-3, Martain Dir., p. 29, ln 1; <i>see also</i> Hrg. Ex. S-1, Staff, p. 29, lns 4-5.) (See also Row 27.)

<sup>16</sup> See Tr. Vol. I, p. 152, ln 25 – p. 153, ln 15; Hrg. Ex. E-4 (Denney Reb.), pp. 62-63. See FN 12 above.

<sup>17</sup> Hrg. Ex. Q-3 (Martain Direct), p. 40, lines 4-10. See FN 13 above.

<sup>18</sup> Hrg. Ex. E-4 (Denney Reb.), p. 40, ln 7 – p. 42, ln 6.

<sup>19</sup> Hrg. Ex. E-4 (Denney Reb.), p. 45, ln 7 – p. 47, ln 3; *see also* Hrg. Ex. S-1, Staff Testimony, Executive Summary, Staff Conclusion No. 7; Tr. Vol. I, p. 155, lines 20-23 (Qwest should be required to develop a cost-based rate for expedites in Phase III).

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	<p>You know in advance.” (Tr., Vol. I, p. 168, ln 23 – p. 169, ln 2, Mr. Steese opening)</p> <p><i>See also</i> “The change at issue here is the <b>imposition of the fee</b> to expedite orders for design services.” (Tr. Vol. I, p. 191, lns 16-17, Albersheim.)</p>	<p>Qwest admits that “several sections of the interconnection agreement contemplate Eschelon paying Qwest a fee to expedite an order.” (Tr. Vol. I, p. 184, lns 21-24, Albersheim.) Therefore, the purpose of the amendment was <i>not</i> to gain the ability to charge a fee. The amendment sets “a certain fee, \$200 per day per expedite,” or Qwest will withhold service (i.e., “reject the order”), regardless of the terms of the ICA and without prior Commission approval.</p> <p>Qwest’s \$200 per day rate is a rate based on what the “market” will allegedly “bear” that has not been approved as a TELRIC-based rate. (Hrg. Ex. Q-7, Million Dir., p. 6, lns 11-14.)</p> <p>Regarding the appropriate rate, see Rows 36-37.</p>
11	<p><b>Willingness to Pay:</b> Qwest suggests Eschelon wants expedites “for free.” (Tr., Vol. I, p. 173, ln 3, Mr. Steese opening)</p> <p><i>See also</i> “By requiring Eschelon to sign an amendment to its interconnection agreement, Qwest is simply asking them to affirm <b>per the terms of their existing agreement</b> that they are <b>willing to pay</b> the fee associated with expediting an order for design services.” (Tr. Vol. I, p. 194, ln 24 – p. 192, ln 3, Albersheim); see also <i>id.</i> Vol. II, p. 297, lns 17-18.</p> <p><i>See also</i> “The whole point here is expedite charges are a separate and distinct charge, and their point is that we</p>	<p>Today Qwest does not provide UNE expedites per the existing ICA – at any price.<sup>20</sup> This is true even though Qwest knows Eschelon will pay charges under the existing ICA<sup>21</sup> In terms of what the rate should ultimately be, Qwest has admitted that it must first show its costs are not recovered in existing rates before obtaining an approved separate rate.<sup>22</sup> Mr. Denney has explained that Eschelon reserves its rights regarding that issue, as well as new ICA language, for the cost case and its new ICA arbitration.<sup>23</sup> Until then, the cost evidence shows at a minimum that Qwest’s “market” based rate of \$200 per day is excessive and is an inappropriate interim rate.</p> <p>Until a rate is established in a different docket, Eschelon has clearly expressed its willingness to pay a separate and distinct expedite charge.</p>

<sup>20</sup> Qwest admitted that even the \$200 per day rate is not available under the ICA, even though it provides Qwest “may charge” for expedites (see Att. 5, ¶3.2.4.2.1), as Qwest requires a separate agreement. (Tr. Vol. II, p. 228, ln 19 – p. 229, ln 12, Albersheim). Evidence of this is that Eschelon offered to pay the \$200 per day in the rehabilitation center example, but Qwest said no under the ICA. (Hrg. Ex. E-1, A-7 at 000132.)

<sup>21</sup> Tr. Vol. II, p. 297, lns 12-14 (Albersheim).

<sup>22</sup> Hrg. Ex. E-6, p. 193, ln 23 – p. 194, ln 2; Tr. Vol. II, p. 235, lns 1-2 (Albersheim).

<sup>23</sup> Tr. Vol. I, p. 158, lns 12-20; p. 15, ln 13 – p. 159, ln 10; p. 161, lns 20-21, p. 163, lns 7-10; *see also* Hrg. Ex. E-1, A-7, at 000138, second full paragraph.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	<p>think they might already be included in an existing rate. So when he talks about an expedite charge, we agree to pay an expedite charge, by definition that is vague and ambiguous; they are saying it's already there.” (Tr., Vol. II, p. 296, lns 14-19, Mr. Steese objection)</p> <p><i>See also</i> “And again, I would say, then why didn't they sign the amendment? (Tr., Vol. II, p. 297, lns 17-18, Ms. Albersheim)</p>	<p>It laid those charges out in writing for Qwest. (Hrg. Ex. E-1, A-7, at 000138.)<sup>24</sup> Contrary to Qwest’s claim that Eschelon is unclear about whether it will pay if the costs are already recovered in existing rates, Eschelon explicitly said that in the interim it will pay a separate charge – even when it leads to double recovery because the separate charge is also included in the installation NRC.<sup>25</sup> <i>The difference</i> is that Eschelon asserts that the separate expedite interim charge should be determined using TELRIC cost principles and <i>Commission-approved rates</i> for those activities (see Rows 36-37), whereas Qwest has implemented an excessive, <i>unapproved “market” based rate</i> (see Row 10).</p> <p>Eschelon explained at the time that no amendment is needed, as the existing ICA allows Qwest to charge Commission-approved rates. (Hrg. Ex. E-1, A-7, at 000138.)<sup>26</sup> Ms. Albersheim admits that the “current agreement allows for charges.” (Tr., Vol. II, p. 273, lns 9-10)</p>
12	<p><b><u>Plain Language - Request to Expedite Versus Capability to Expedite:</u></b> “And now I'll go into the facts of the breach of contract claim. And Your Honor knows that when you look at a breach of contract claim, the first thing you do is look at the plain language of the contract. And if the plain language of the contract controls and is</p>	<p>Qwest attempts to equate the capability to <i>request</i> expedites of orders with the capability to <i>expedite</i> orders. (See also Hrg. Ex. Q-2, Albersheim Reb, p. 9, ln 25.) The “plain language” of ICA Att. 5, ¶3.2.2.13, however, refers not to a capability to request expedites but to the “<i>capability to expedite</i> a service order.” UNE loop requests are made on a service order. (Hrg. Ex. E-4, Denney Reb., p.</p>

<sup>24</sup> See Hrg. Ex. E-1, A-7, at 000137-000139 (Eschelon letter indicating that “whenever Eschelon requests an expedite for an unbundled loop order and Qwest grants the request,” Eschelon will pay the Commission-approved rates for the work and activities to perform the expedite. The Commission has approved proceeding on an Individual Case Basis (ICB). Hrg. Ex. E-4 (Denney Reb.), p. 40, ln 7 – p. 42, ln 6. The approach identified by Eschelon in its letter is how ICB pricing should work. See Row 36 below.

<sup>25</sup> See Hrg. Ex. E-1, A-7, at 000138, offering to pay a dispatch charge and stating: “When the dispatch cost is included in the installation charge, this is double recovery by Qwest.” Even though costs for labor to expedite may already be included in the installation charge for re-installing service, Eschelon offered to both pay that installation charge and to pay the half hourly rate for time actually spent on the expedite itself. See *id.*

<sup>26</sup> When Commission-approved rates do not appear in the ICA, Qwest charges them pursuant to the Rates and Charges General Principle that charges must be in accordance with Commission rules and regulations. See ICA, Att. 1, ¶1.1, Exhibit 2 to this Brief. See Tr. Vol. I, p. 138 (Denney), lines 22-24; Hrg. Ex. E-3 (Webber/Denney Dir.), p. 41 at footnote 44. See also Hrg. Ex. #4 (Denney Reb.), DD-8, p. 5 (last full paragraph) (explaining application of Commission-approved rates from UNE cost cases). See Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) at ¶¶105-106 & 108-109.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	<p>unambiguous, then you apply the plain language. And let's talk about the plain language first. And Mr. Denney talked about Section 3.2.2.13, and I will as well. And I have put a few pages in front of Your Honor right to your right that have a few provisions, and the third page is 3.2.2.13. And the plain language of the contract says that Qwest is going to provide Eschelon with the capability to expedite an order. And clearly the capability exists, a process exists, LSRs exist, personnel exist. We've heard that escalation process exists. There is no question but that the process exists and is available. (Tr., Vol. I, p. 167, ln 16 – p. 168, ln 22, Mr. Steese opening) . . .</p> <p>“Now the other items. So when you look at the contract, what do we see? Does Qwest have a process? Answer, yes. Did Qwest have a process of notifying Eschelon within two hours of whether it would accept an expedite? Answer, yes.” (Tr., Vol. I, p. 170, ln 22 – p. 171, ln 1, Mr. Steese opening)</p>	<p>17, ln 7.) There is no clause in this general “Business Process Requirements” paragraph that says “except for design services” or “except for unbundled loops.” To the contrary, Attachment 5 of the ICA expressly refers to expedited service in the context of coordinated cutovers – an unbundled loop activity. See Att. 5, ¶ 3.2.2.5.<sup>27</sup></p> <p>Qwest says “clearly the capability exists, a process exists, LSRs exist, personnel exist.” (See also Tr. Vol. I, p. 136, ln 17 – p. 138, ln 3.) But that is the capability to make a request and to receive <i>only</i> a negative answer in the case of every UNE order, across the board. Qwest’s proffered capability is illusory. The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent the other party to the contract from receiving the benefits of the agreement.<sup>28</sup> Without the capability to expedite service orders for UNEs, Eschelon is denied the benefit of a provision clearly intended to require (“shall provide”) expedite capability for all service orders. Qwest conceded at the hearing that the expedite capability that the ICA refers to applies to both design and non-design services. (Tr. Vol. II, p. 227, lns 13-17, Albersheim.)</p>
13	<p><b><u>Plain Language - Complete or Not Complete Order:</u></b> “But the next sentence Eschelon ignores in its testimony. It says within two hours we shall notify Eschelon if we are going to accept the request for an expedite. Here with the rehabilitation center, Ms. Johnson admitted we did that. We notified within two hours.” (Tr., Vol. I, p.168, lns 17- 22, Mr. Steese opening) . . .</p> <p>“This doesn't say they have the uniform ability to ask that any order be expedited and we have to do it. It says we shall provide the capability to expedite an</p>	<p>Qwest said <i>no</i> within two hours, purely on the basis that Qwest required an ICA amendment that is unnecessary. (See Row 11.) Qwest claims that “Eschelon ignores” a sentence in 3.2.2.13, while Qwest itself selectively chooses to rely on only a portion of that same sentence. The “plain language” of Paragraph 3.2.2.13 refers to Qwest notifying Eschelon of Qwest’s “confirmation to complete” in some cases, as well as “not complete” in other cases, in an ICA provision which applies to all service orders. Qwest’s approach, however, would read out of the contract the phrase “confirmation to complete” to allow Qwest to not complete the expedite for every request for a designed</p>

27

Hrg. Ex. E-4 (Denney Reb.), p. 17, lines 8-17; Tr. Vol. I, p. 127, lns 13-20.

28

*Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (Ariz. 1986).

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	order and we will tell them within two hours. And we've satisfied that completely in change management.” (Tr., Vol. I, p.169, lns 18- 22, Mr. Steese opening); <i>see also id.</i> p. 175, lns 5-6 & 11-12.	service. Qwest admits, however, the expedite capability applies to design and non-design services. (See Row 14.)
14	<b><u>Completing POTS and Not Completing Design Requests:</u></b> “Now, Eschelon says that because the word service order is there that if we have the ability to deny and routinely deny requests, then we've eviscerated the meaning of the contract. But Mr. Denney admitted otherwise. Because if we don't have an emergency condition exist -- and Your Honor honed right in on this in your questioning <sup>[29]</sup> -- then Qwest has the ability to reject for that reason, and we've already told them.” (Tr., Vol. I, p. 169, lns 14-17, Mr. Steese opening)	Mr. Denney actually testified <sup>30</sup> that ICA ¶3.2.2.13 is broader, as it is also consistent with that paragraph to provide cost-based charges for expedite capability, though Qwest has not developed a process to implement that capability consistent with the existing ICA. (Tr. Vol. I, p. 160, lns 16-17.) <sup>31</sup> Therefore, he did not agree with Mr. Steese's apparent suggestion that the reference in ¶3.2.2.13 to completing or not completing expedite requests is satisfied by providing expedite capability for POTS only in emergency situations ( <i>i.e.</i> , completing them for POTS only when the emergency conditions are met and refusing them when they are not met for POTS, as well as all cases for design services). Consistent with Mr. Denney's testimony, Qwest's own witness later admitted: <b><i>Q. And I believe you told me the contract does not distinguish between design and non-design services; correct? A. That's correct.</i></b> <b><i>Q. And so the capability -- the expedite capability that the Interconnection Agreement</i></b>

<sup>29</sup> Qwest did not identify the particular question by the ALJ, but Mr. Steese appears to be referring to Tr., Vol. I, p.160, ln 19 – p. 161, ln 1 (ALJ cross of Denney): “Q Well, I was just looking at that Section 13, 3.2.2.13, and just looked at – I'm just reading off of your little chart. Qwest shall provide CLEC the capability to expedite a service order. That just says you have the right, you have the capability to expedite. It doesn't say anything about what kind of expedite or whether it's certain criteria have to apply or not.”

<sup>30</sup> Mr. Denney indicated that, while there may be a box on the order to check for expedites and there may be personnel to call to request one, Qwest does not provide the capability to expedite any loop order, because in all cases when the box is checked or a call is made, Qwest will reject the request for expedite of a service order for loops. See Tr. Vol. I, p. 136, ln 17 – p. 138, ln 3 (Denney).

<sup>31</sup> The ICA requires that a process be developed. See ICA Att. 5, ¶3.2.2.12 (“shall”). The ICA, like state and federal law, also requires nondiscrimination. See ICA Part A, ¶31.1. Regarding fee-added expedite capability, although it has been available to Qwest retail customers of designed services (see footnote above), there is currently no mutually developed expedite procedures to implement this term (or the term saying charges “may apply” in Att. 5, ¶3.2.4.2.1). Eschelon informed Qwest, during development of the procedures for a fee-added process, that to be mutual, Eschelon expected fee-added expedites to be offered at a Commission approved rate. Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 7 (quoted in footnote below). Qwest has not yet implemented procedures associated with Commission approved rates, as requested by Eschelon. See *id.*; Hrg. Ex. E-1, A-7 at 000138. As to when a rate should apply and the amount of the rate, see Rows 36-37.

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		<p><i>refers to <u>applies to both</u> design and non-design services. Is that not the case?</i></p> <p><i>A. <u>Yes</u>. It's a broad application.</i> (Tr. Vol. II, p. 227, lns 9-17, Albersheim)</p>
15	<p><b><u>Expedite Capability Today:</u></b>          “Do you have the ability to request an expedite and get one? Yes.” (Tr., Vol. I, p. 169, lns 2-3, Mr. Steese opening)</p>	<p>Qwest’s witness testified:          “Q. As Eschelon's Interconnection Agreement exists today, Qwest does not provide Eschelon with the capability to receive an expedited loop; is that correct? A. That's correct.” (Tr. Vol. II, p. 229, lns 9-12, Albersheim)</p>
16	<p><b><u>Mutually developed and agreed upon:</u></b>          “So what they do is they turn forward to Section 3.2.2.12, and they say the process wasn't, quote, mutually developed. And actually, it was interesting to hear Mr. Denney, because he would <i>never</i> use the word mutually developed. He consistently said -- <i>and I encourage you to look at the transcript</i> – mutually developed and agreed upon..” (Tr., Vol. I, p. 169, ln 23 – p. 170, ln 4, Mr. Steese opening)</p>	<p>Despite Qwest’s claim that Mr. Denney “never” used the words mutually developed, the transcript shows that Mr. Denney both used these words (Tr. Vol. I, p. 131, ln 11 &amp; p. 135, lns 12-13) and agreed to their use (Tr. Vol. I, p. 146, lns 16-19). The transcript shows that Mr. Denney used the phrase “mutually developed agreed upon” once, and that was in reference to the lack of a fee-added process. (Tr. Vol. I, p. 160, lns 17-18.) Mr. Denney used the term “mutually agreed upon” once regarding emergency-based expedites. (Tr. Vol. I, p. 161, ln 12)</p>
17	<p><b><u>Mutually Develop Versus Agree:</u></b>          “Now, sometimes in that development parties would not agree.” (Tr., Vol. I, p. 170, lns 10-11, Mr. Steese opening)</p> <p>“But the word develop and the word agree are two very different terms. It doesn't say mutually agree. It says mutually develop. And if you turn forward one page in the document in front of you, there are provisions -- and this is just one -- in the contract with Eschelon that use the terms mutually agree. And, indeed, the term agree is in the interconnection agreement 83 times that require the parties to reach an accord. And the fact that the term agree is not in 3.2.2.12 is very important to contract interpretation.” (Tr., Vol. I, p. 170, lns 11-21, Mr. Steese opening)</p>	<p>The ICA, at Part A, ¶27.2, provides that if the parties are “unable to agree on certain items,” they may bring the items to this Commission. (See Row 4)</p> <p>Qwest attempts to read Att. 5, ¶3.2.2.12 as though it said “develop,” instead of “mutually develop.” “Mutual,” with respect to a feeling or action, is defined to mean “experienced or done by each of two or more parties toward the other or others.” (The New Oxford Dictionary, 2001). Synonyms of “mutually” include: “commonly,” “jointly,” “in agreement,” and “as one.” (Roget’s Int’l Thesaurus, 4th ed. 1977). The definition of “mutually” is similar to the definition of “agree” read by Ms. Albersheim at the hearing (Tr. Vol. I, p. 190, lns 8-12), and yet she does not even acknowledge the modifier “mutually” before “develop” when pointing out the “stark contrast” between “develop” and “agree.” (<i>Id.</i> ln 8.) Contrary to Qwest’s approach, contract interpretation rules quite</p>

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		<p>logically require each term to be given effect.<sup>32</sup> Ms. Albersheim, an attorney, is apparently aware of this rule of construction, as she claims that Qwest's interpretation "gives meaning to each and every word of those provisions." (<i>Id.</i> p. 182, lns 19-21.) Qwest Hrg. Ex. Q-24, for example, includes a provision (§1.1.5.1) that refers to "develop" without the word "mutually" before it. Applying Qwest's approach, if no mutuality in the form of agreement were required in the development of procedures for expedites, there would have been no need to insert "mutually" before "develop." The word is used in the ICA expedite provision and must be given effect.</p>
18	<p><b><u>Charges May Apply (Whether by Type of Product):</u></b> "But now if we look at the final page of this document [Q-25], it says expedite charges may apply. With Qwest's process, expedite charges do not apply to requests to expedite POTS orders, but they do apply for design services orders. So by the express terms of Qwest's process, they may apply. <i>They apply to design services.</i> They do not apply to POTS." (Tr., Vol. I, p. 171, lns 4-10, Mr. Steese opening); See also Tr. Vol. II, p. 230, lns 10-19 (Albersheim).</p>	<p>Mr. Steese is reading into the ICA a distinction between design and non-design that Qwest's own witness admitted does not exist in the ICA. (See Row 12 &amp; 14.) The "very broad" language of this section, which "doesn't distinguish between services,"<sup>33</sup> indicates that charges may apply to all products in some cases and may not apply to all products in others (such as when emergency conditions are met). The Staff's recommendations are consistent with this application.<sup>34</sup> At a minimum, Qwest's position is an admission that this section has some application to design services/UNEs (though today Qwest provides no expedite capability for design services/UNEs per the ICA). Even assuming Qwest's reading of the ICA language were correct, Qwest does not adhere to the terms of the ICA as now interpreted by Qwest. Qwest admits ICA Att. 5, §§3.2.4.2.1, 3.2.4.3.1, &amp; 3.2.4.4 (all providing expedite charges "may apply") entitle Eschelon (and other CLECs who also opted into the AT&amp;T ICA or otherwise have the same ICA language) at least to fee-added expedites for design service orders under these paragraphs of the existing ICA. Qwest,</p>

<sup>32</sup> *Allen v. Honeywell Retirement Earnings Plan*, 382 F. Supp. 2d 1139, 1165 (D. Ariz. 2005); *see also Central Arizona Water Conservation District v. United States*, 32 F. Supp. 1117, 1128 (D. Ariz. 1998) (court must avoid a contract interpretation that would render a contract provision meaningless).

<sup>33</sup> Tr. Vol. II, p. 223, lines 22-23 (Albersheim).

<sup>34</sup> Hrg. Ex. S-1, Staff Testimony, Executive Summary, Staff Conclusion Nos. 2-3.



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		however, does not provide fee-added expedite capability for loops per the existing ICA at any price.
19	<p><b><u>Charges May Apply (Rate Qwest May Charge):</u></b> “Does Eschelon's interpretation of the contract give any meaning to not one, not two, but three sections, all of which say expedite charges may apply? And the answer is no.” (Tr., Vol. I, p. 171, lns 11-14, Mr. Steese opening) . . .</p> <p>“And what they ask this Commission to do is give the contract an interpretation that will <i>never allow Qwest to get an expedite charge</i>. And so the interpretation applied by Eschelon and by Staff is to eviscerate the plain meaning of these provisions.” (Tr., Vol. I, p. 171, lns 17-21, Mr. Steese opening)</p> <p>Cf. “And we just heard Mr. Denney say that this setting a cost-based rate is what is necessary.” (Tr., Vol. I, p. 177, lns 8-9, Mr. Steese opening)</p>	<p>Actually, the answer is yes. Eschelon, like the Staff,<sup>35</sup> interprets ICA Att. 5, ¶¶3.2.4.2.1, 3.2.4.3.1, &amp; 3.2.4.4 (all providing expedite charges “may apply”) as requiring expedite capability for all service orders, including those for UNE loops, at cost-based rates. So, expedite charges may apply per the ICA, but they must be cost-based. See Complaint, ¶I, Page 14, lines 1-3, requesting: “An order enforcing the Commission approved ICA <i>to require Qwest to provide such expedite capability at Commission approved rates and, when applicable outage and Emergency conditions exist, at no additional charge.</i>”<sup>36</sup></p> <p>See also Rows 36-37 (regarding how to proceed regarding the rate in this case).</p>
20	<p><b><u>One Additional Nickel in Payment for Expedites:</u></b> “Mr. Denney just admitted this. He said Eschelon has never paid one additional nickel of additional money for an expedite charge.” (Tr., Vol. I, p. 171, lns 14-16, Mr. Steese opening)</p> <p>See also “My question was has Eschelon -- and I will add this clarification -- ever paid one red cent, one red cent for an expedite charge under the interconnection agreement in Arizona ever?” (Tr. Vol. I, p. 140, lns 12-15, Mr.</p>	<p>Qwest provided no evidence that it has billed Eschelon for expedites <i>under the ICA</i>. As stated in the Complaint (¶38, p. 12, lns 7-8): “That Eschelon paid the much higher special access private line charge to get service for Customer demonstrated this willingness [to pay].” Mr. Denney actually said that charges are consistent with the language of the ICA,<sup>37</sup> but Qwest has not shown that it is not already recovering its costs in existing rates (<i>i.e.</i>, is not already receiving charges)<sup>38</sup> or developed a cost-based rate in AZ. Qwest simply does not offer fee-added expedites under the existing ICA at any price, so there is no charge to pay, even though</p>

<sup>35</sup> Hrg. Ex. S-1, Staff Testimony, Executive Summary, Staff Conclusion No 7; Tr. Vol. I, p. 155, lines 20-23.

<sup>36</sup> Tr. Vol. I, p. 164, lns 12-22 (Denney). See also Hrg. Ex. S-1, Staff Testimony, Executive Summary, Staff Conclusion Nos. 2-3.

<sup>37</sup> Tr. Vol. I, p. 160, lns 16-17 (Denney). See footnote above.

<sup>38</sup> Tr. Vol. I, p. 141, ln 22 – p. 142, ln 4; p. 160, lns 17-24 (Denney).

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	Steese cross)	<p>Eschelon has said it is willing to pay. (See Row 11.) Specifically, in response to Mr. Steese's question, Mr. Denney testified:</p> <p>"A. I'm not aware that Qwest has ever requested charge under our contract for that. There's emergency- based conditions. So the best of my knowledge, we have not paid for that. There is provisions in the contract by which says charges may apply. And to the best of my knowledge, Qwest has never said, here are the particular charges that apply to that particular expedite.</p> <p>Q. Well, Qwest did say that for unbundled loops. You just disagree with that rate; true?</p> <p>A. You didn't say this is the charge, here is what we -- the cost we incurred for this particular loop. You said, here is this market-based rate that has nothing to do with a cost-based rate that's basically been, you know, under Commission jurisdiction." (Tr. Vol. I, p. 140, ln 16 – p. 11, ln 4)</p> <p>In other words, Eschelon would have paid "one additional nickel," and more, had Qwest provided expedite capability for UNEs at an ICB rate using Commission-approved rates per the ICA, instead of unilaterally demanding an excessive, unapproved "market" based rate. (See Rows 11 &amp; 36.)</p>
21	<p><b>Participation - Versus Consent:</b> "And there are many times when Eschelon recommends a process and Qwest doesn't agree, and that goes forward and becomes the process. Maybe it's Level 2 to Level 3 versions and more has to happen. Maybe they make recommendations. And the whole point is that does Eschelon breach the contract if Qwest didn't agree every step of the way in the process? Answer, no." (Tr. Vol. I, p. 172, lns 7-14, Mr. Steese</p>	<p>It is important to note that CLEC "participation does not equate to consent."<sup>39</sup> It is undisputed that Qwest acts over CLEC objection in CMP, even when the ICA requires mutuality.<sup>40</sup> Unlike Qwest, Eschelon cannot proceed with a change in CMP over Qwest objection.<sup>41</sup> Therefore, unlike Qwest, Eschelon cannot breach the ICA in this manner.</p> <p>With respect to Versions 27 and 30, Eschelon's alleged "involvement" was to object. There was no mutual development of these changes.</p>

<sup>39</sup> Hrg. Ex. E-3 (Webber/Denney Dir.), p. 18, lns 18-19; Hrg. Ex. E-4 (Denney Reb.), p. 19, ln 1 – p. 22,

ln 14.

<sup>40</sup> See, e.g., Hrg. Ex. E-2 at BJJ-K (Summary of Eschelon Objections and Dispute Resolution).

<sup>41</sup> Hrg. Ex. E-3 (Webber/Denney Dir.), p. 17, ln 19 – p. 20 ln 15.

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	<p>opening) . . . “There is no conflict. They just didn't, quote, agree. They were involved in the process where the Version 30 and Version 27 were developed. They just didn't like the outcome, and their reaction is to say because of that there is a breach.” (Tr. Vol. I, p. 173, lns 5-9, Mr. Steese opening)</p>	<p>Qwest by itself prepared the changes and afterward sent them to CLECs and then implemented them over CLEC objection.</p> <p>In Qwest's example, there is no agreement to breach, because the example assumes that Qwest and Eschelon do not reach agreement (i.e., “Qwest didn't agree”). That is different from the facts in this case, when Qwest and Eschelon have an agreement requiring Qwest to provide expedite capability, Qwest in fact provided expedite capability for loops per the agreement for some time, and Qwest later withholds expedite capability over Eschelon's objection, with no change in the ICA terms and no prior Commission approval.</p>
22	<p><b><u>Uniformity - Versus Individual ICAs:</u></b></p> <p>“The way change management works is it is the place where uniform processes are created for the industry to implement contracts.” (Tr. Vol. I, p. 172, lns 7-19, Mr. Steese opening) . . .</p> <p>“And what they, Eschelon, are saying is because we didn't agree with a recommended change of Qwest that followed change management to the letter, that Qwest can't utilize that process. Well, that defeats the entire purpose of change management to create uniform process.” (Tr. Vol. I, p. 172, lns 20-24, Mr. Steese opening). . .</p> <p>“Now, changing to change management where Ms. Jill Martain will testify. And Ms. Martain for a period of years ran the change management process for Qwest.” (Tr. Vol. I, p. 173, lns 13-15, Mr. Steese opening)</p>	<p>The way change management is <i>supposed</i> to work is that it cannot be used to modify ICA terms. Qwest's assertion about uniformity is unsupported in fact. To the contrary, the CMP re-design documentation shows that CMP was specifically designed to account for differences in individual CLEC ICAs. (Hrg. Ex. E-4, Denney Reb., p. 22, ln 15 – p. 24, ln 10, quoting Qwest's CMP Redesign materials.) In Minnesota, the ALJs said:</p> <p>“The CMP document itself provides that in cases of conflict between changes implemented through the CMP and any CLEC ICA, the rates, terms and conditions of the ICA shall prevail. In addition, if changes implemented through CMP do not necessarily present a direct conflict with an ICA but would abridge or expand the rights of a party, the rates, terms, and conditions of the ICA shall prevail.<sup>42</sup> <b><i>Clearly, the CMP process would permit the provisions of an ICA and the CMP to coexist, conflict, or potentially overlap.</i></b> . . . Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from</p>

<sup>42</sup> [MN] Ex. 1 (Albersheim Direct) at RA-1, part 1.0, page 15. [The CMP Document is Hrg. Ex. E-1, A-9 in this case. The Section 1.0 (Scope) language is found at 000173 of A-9.]

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	<p>See also Hrg. Ex. Q-4 (Martain Rebuttal, p. 18, lns 23-27): “CLECs shouldn’t be permitted to pick and choose which document they wish to operate from, with respect to the CMP processes and their ICA. If they choose to participate in CMP and actively contribute in developing those processes, then they should be required to abide by all of the terms and conditions that are developed through the CMP.”</p>	<p>Qwest making important unilateral changes in the terms and conditions of interconnection.<sup>43</sup> Ms. Martain testified that she has “been involved with the Change Management Process since 2002 and managed the Change Management Process from July 2004 through June 2006.” (Hrg. Ex. Q-3, p. 4, lns 5-6) Her own testimony, which is contrary to the “plain language” of the CMP document itself (see Row 23), as well as the CMP redesign documentation, shows the need for a Commission ruling to ensure CMP works as intended for expedites, and not as Qwest now admits it interprets and applies it.</p>
23	<p><b><u>Scope of CMP – ICA Prevails for Only Direct Conflicts - or Also Abridging or Expanding Rights:</u></b>          “And the <i>only</i> time that the processes agreed to in this change management process do not apply is if it conflicts <i>directly</i> with the terms of the interconnection agreement.” (Tr. Vol. I, p. 172, lns 7-19, Mr. Steese opening)</p> <p>See also Hrg. Ex. Q-4 (Martain Rebuttal, p. 18, lns 23-27) (quoted in previous Row, #21)</p>	<p>To the contrary, Qwest’s own CMP document is very clear on this point:          “In <i>cases of conflict</i> between the changes implemented through this CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement. <i>In addition</i>, if changes implemented through this CMP <b><u>do not necessarily present a direct conflict</u></b> with a CLEC interconnection agreement, <i>but would abridge or expand the rights of a party to such agreement</i>, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.” (Qwest CMP Document, §1.0, Hrg. Ex. E-1, BJJ A-9 at 000173)</p>
24	<p><b><u>Status of Emergency Condition Language - Throughout ICA Term:</u></b>          “There is nowhere in their contract that says the emergency conditions procedure must apply. There is nowhere it says medical emergencies.” (Tr. Vol. I, p. 172, ln 25 – p. 173, ln 2,</p>	<p>This has always been the case for the ICA, which terms have not changed in this respect.<sup>44</sup> Yet, for six years Qwest provided expedite capability for UNE loops per the same ICA when emergency conditions were met. (Answer, Page 9 ¶14, lns 24-25; Hrg. Ex. E-1, Johnson Dir., p. 11, lns 7-12.)<sup>45</sup> Obviously the</p>

<sup>43</sup> MN Arbitrators’ Report, at ¶¶ 21-22 (footnote in original; emphasis added) (quoted in Hrg. Ex. E-4 (Denney Reb.), p. 11, lns 4-20.

<sup>44</sup> See Hrg. Ex. E-4 (Denney Reb.) at DD-2, Row 1 (showing the ICA language has not changed).

<sup>45</sup> See also Hrg. Ex. Q-5 (Novak Dir.), p. 5, lines 5-12 & lines 21-22 (Qwest “uniformly followed the process in existence at the time for expediting orders for unbundled loops”). There is also nowhere in the

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	Mr. Steese opening)	contract supports doing so, as Qwest itself interpreted the Commission-approved ICA in that manner for six years. Ms. Albersheim testified that the emergency conditions did not expand the ICA; only “further defined” it. (Tr. Vol. II, p. 300, lines 6-14.) Qwest cited no change of law or Commission ruling allowing it to abruptly stop offering emergency-based expedites for loops per the ICA without first going to the Commission. <sup>46</sup>
25	<p><b><u>Qwest as Good Samaritan -Versus ICA Terms and Cost Recovery Principles:</u></b> There is nowhere it says that they'll get it for free or for no additional cost.” (Tr. Vol. I, p. 172, lns 7-19, Mr. Steese opening)</p> <p><i>See also</i> Should Qwest “be obligated to expedite the order at no charge to you just to be nice?” (Tr. Vol. I, p. 29, lns 20-21, Mr. Steese cross)</p> <p><i>See also</i> “under no circumstance should Qwest be penalized for trying to be a Good Samaritan and offer something to CLECs that it is not legally obligated to provide.” (Hrg. Ex. Q-2, Albersheim Reb., p. 15, lns 4-6.)</p>	<p>There is also nowhere in the ICA that says Qwest may over-recover or unilaterally start to charge “market” based rates for capability it previously provided at no additional charge. To the contrary, the ICA provides that, if Qwest desires to charge for an activity, including one for which it previously did not charge, Qwest needs to first seek dispute resolution, which may include going to the Commission for approval. (See, e.g., ICA Att. 1, §1.2 at Complaint, Exhibit 1, p. 3.)<sup>47</sup> In fact, Qwest has admitted that, if Qwest wants to get a separate rate for an activity, it needs to first prove that the cost of performing that activity is not already recovered in existing rates.<sup>48</sup> Qwest, however, has not demonstrated (or even made any attempt to demonstrate) that, in those situations in which no additional expedite charge applies due to an emergency condition, Qwest is not already recovering its costs in the non-recurring charge (NRC) for the re-installation and the recurring charges.<sup>49</sup> (The fact that Qwest provided these expedites for six years without additional charges under the ICA</p>

Qwest retail tariffs that says the emergency conditions must apply, but Qwest applies them for at least certain retail customers. See Row 7 and accompanying footnotes.

<sup>46</sup> Even if there were a pertinent change of law, Qwest would have needed to obtain a Commission-approved amendment to the ICA before stopping to provide service under the existing ICA. See also Hrg. Ex. S-1, Staff Testimony, p. 34, lines 19-21.

<sup>47</sup> Regarding prior Commission approval before implementing a change in CMP, see In re. US West Communication Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, ACC Docket No. T-00000A-97-0238, Decision No. 66242, ¶¶105-106 & 108-109 (Sept. 16, 2003) (cited in the Complaint, ¶13, p. 6, footnote 1).

<sup>48</sup> Hrg. Ex. E-6, p. 193, ln 23 – p. 194, ln 2; Tr. Vol. II, p. 235, lns 1-2 (Albersheim).

<sup>49</sup> Tr. Vol. I, p. 141, ln 22 – p. 142, ln 4 (Denney).

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		supports an inference that Qwest is recovering its costs elsewhere. <sup>50</sup> ) Moreover, when the emergency conditions are met, Qwest expedites only if resources are available. Therefore, Qwest incurs no cost to add resources for expediting an order, as Qwest simply denies the request. <sup>51</sup> (See Row 37)
26	<p><b><u>Version 11/Covad CR – CLEC Disconnect in Error – Optional Process:</u></b> “And the first big change, as Ms. Martain will testify to, is Version 11. And Version 11 came forward because of Covad. And this is where the two different types of expedites came into existence, the preapproved category and the expedites requiring approval category. And Eschelon made -- excuse me, not Eschelon. Covad made the request. And the reason they made the request is because if the CLEC disconnected in error, they did not have a means to get the circuit back up and running, exactly what happened at the rehabilitation center. And they wanted to make sure that they could get expedites, and the notes show from change management that that was the very basis of Version 11.” (Tr. Vol. I, p. 172, lns 7-19, Mr. Steese opening)</p>	<p>The complete Change Request detail for Covad’s Change Request shows that, while one particular example used by Covad involved a CLEC disconnect in error, Covad’s request was not limited to that example,<sup>52</sup> and Covad itself said an example it provided was not “as critical” as when one of the emergency conditions is met.<sup>53</sup> (See Row 37.) Based upon the evidence, Staff correctly concluded that Covad did not ask to alter the emergency-based process (or to freeze them in time<sup>54</sup>). (Hrg. Ex. S-1, Staff Testimony, p. 29, lns 13-19 &amp; p. 38, lns 12-17.) Covad requested an optional “enhancement” to the process to add fee-added expedites, for which “it shouldn’t matter what the history or circumstances are, if we are willing to pay for the expedite.” (Hrg. Ex. Q-4 at JM-R1, p. 7 of 9, 2/27/04 Covad Clarification Call minutes.)</p> <p>And, the CMP record shows that Eschelon made clear that it was not agreeing to any change that altered its ability to obtain expedites for UNE loops and only proceeded once Qwest assured Eschelon that was the case. (See Hrg. Ex. E-2, Johnson Reb., p. 9, lns 3-23, quoting CMP minutes.<sup>55</sup>) Eschelon also clearly</p>

<sup>50</sup> Tr. Vol. I, p. 159, ln 17 – p. 160 ln 4 (Denney).

<sup>51</sup> Hrg. Ex. E-4 (Denney Reb.), p. 39, lns 1-16.

<sup>52</sup> Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 1-9. See, eg., the title (“Enhancement to Existing Process for Provisioning” and description of Covad’s requested change (“Covad requests that Qwest provide a formal process to expedite an order that requires an Interval that is shorter than what is currently available for the product.”) *Id.* at 1.

<sup>53</sup> Hrg. Ex. Q-4 at JM-R1, p. 7 of 9, 2/27/04 Covad CMP Clarification Call minutes.

<sup>54</sup> Hrg. Ex. Q-4, Martain Reb., p. 17, lns 14-20 (“revert” to Version 11 as implemented by Qwest). See Row 37.

<sup>55</sup> In response to Eschelon’s CMP comments on the Covad change request, Eschelon obtained two commitments from Qwest (both reflected in Qwest’s CMP Response, quoted at Hrg. Ex. E-2, Johnson Reb., p. 9): (1) implementation of the Covad Change Request would not result in replacement of the existing emergency-based option (*i.e.*, “continue with the existing process that is in place”); and (2) resources would remain available to process expedite requests under the existing emergency-based option even with the addition

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		stated its expectation that any rate for a fee-added process should be Commission approved. (Hrg. Ex. Q-4, Martain Reb., JM-R1 at 7. <sup>56</sup> ) Note that Eschelon did <i>not</i> say allowed to go into effect, and specifically said "Commission approved." ( <i>See id.</i> )
27	<p><b><u>Trigger for Qwest-Initiated Version 30:</u></b> "And then Qwest began to train its people, and what Qwest saw was it's supposed to create nondiscriminatory processes for all CLECs and for itself. And there were some parties like Eschelon who weren't paying for expedites when most people were for design services. <i>And that is what drove Version 30, to create uniformity and to create nondiscriminatory treatment between all parties.</i>" (Tr. Vol. I, p. 174, lns 10-17, Mr. Steese opening)</p> <p>See Row 10 regarding the purpose of Qwest-initiated Versions 27 and 30.</p>	<p>Eschelon's receipt of emergency-based expedites at no additional charge had always been the case for loops, and this did not change in the fall of 2005, <i>before</i> Qwest announced Versions 27 and 30.<sup>57</sup> Therefore, Eschelon's situation was not the trigger for Versions 27 &amp; 30. Qwest retail customers received fee-added expedites for design services, while Eschelon did not.<sup>58</sup> If Qwest's goal was to create nondiscriminatory treatment, Qwest would have offered fee-added expedites to CLECs all along. Therefore, nondiscriminatory treatment was not the trigger. Even if Qwest had charged the retail rate to CLECs, CLECs would have paid no more than 50% of the NRC for fee-added expedites for design services at least from 2000-2004. Qwest did not, however, provide fee-added expedites at the retail rate to CLECs before 2004. Therefore, even nondiscrimination that is erroneously<sup>59</sup> defined as the same price for retail and wholesale was not the trigger. Nothing changed with respect to the <i>ability</i> to receive these expedites prior to Qwest's change in the fall of 2005. What changed? The <i>rate</i>. The Qwest-initiated changes implemented in CMP by Qwest over CLEC objection were a means to implement an</p>

of the optional fee-added alternative (*i.e.*, "this will not impact resources"). In addition, Eschelon made clear that rates for fee-added expedites should be commission approved (see next footnote below).

<sup>56</sup> Hrg. Ex. Q-4 (Martain Reb.), JM-R1 at 7(emphasis added) – CMP minutes, stating: "Jill Martain advised there would be charges in the ICA, and the amendment would have to be written. *Bonnie said they would have to be commission approved rates.* Jill advised she is not the expert on this process but she believes so."

<sup>57</sup> See Hrg. Ex. E-4 (Denney Reb.) at DD-2, Rows 1-3. Regarding "uniformity," see Row 22 above.

<sup>58</sup> At all relevant times, Qwest's retail tariffs have made fee-added expedites available to Qwest's retail customers for design services, although the retail rate increased from a cap of no more than 50% of the NRC to \$200 per day in 2004. See Tr. Vol. I, p. 152, ln 25 – p. 153, ln 15. In contrast, Qwest did not make fee-added expedites for design services available to CLECs until 2004. See Hrg. Ex. E-1, A, at 000005 – 000007. Version 11 was effective on July 30, 2004. See Hrg. Ex. E-1, A-2 at 000059.

<sup>59</sup> Hrg. Ex. E-4 (Denney Reb.), p. 51, lines 4-14.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		unapproved rate without first seeking Commission approval. Rates are outside the scope of CMP, <sup>60</sup> yet Qwest used CMP to require a “per day” rate structure in CMP. (See Row 10.)
28	<p><b><u>Other Rejected Requests – Burden to go to Commission:</u></b> “And that happened several more times before the rehabilitation center. So there should have been no question when they asked for an expedite for the rehabilitation center that Qwest was going to say, no, we’re not giving this to you.” (Tr. Vol. I, p. 175, lns 17-11, Mr. Steese opening)</p>	<p>There should have been no question that Qwest <i>would</i> have provided the expedite based the language of the ICA, particularly in light of the CMP Document’s provision that the ICA controls. (See Row 23.) The fact that Qwest had already rejected some orders when it should not did not indicate that Qwest would necessarily continue to violate the ICA. Qwest sometimes indicates that it <i>will require a contract amendment</i> when in fact it does not or should not. Qwest had previously taken such positions and then backed down. (Hrg. Ex. E-4, Denney Reb., p.31, ln 3 – p. 32, ln 8.) If Qwest was not going to back down in this case and was going to enforce its PCAT against CLECs despite the language of their existing ICAs, it was incumbent on Qwest to come to the Commission to obtain the right to do so and to receive approval of any amendment. (See, e.g, Hrg. Ex. S-1, Staff Testimony, p. 34, lines 19-21.)</p>
29	<p><b><u>Rehabilitation Center Example – Denial for No Amendment at the Time Versus Later Claim of No Medical Emergency:</u></b> Tr. Vol. I, p. 175, ln 13 – 177, ln 5 (Mr. Steese opening) . . .</p> <p>“Qwest denies the request because there is no amendment.” Tr. Vol. I, p. 175, lns 19-20 (Mr. Steese opening)</p> <p>“there is no medical emergency” Tr. Vol. I, p. 177, ln 1 (Mr. Steese opening)</p>	<p>See Complaint ¶¶22-42; Chronology, Att. 1 to Hrg. Ex. S-1 (Staff Testimony).</p> <p>Qwest admits that the only reason given at the time for rejecting the expedite request was because Qwest demanded an ICA amendment.<sup>61</sup> Qwest did not claim at the time that the medical emergency condition was not met, and now seeks to rely upon information that Qwest alleges it obtained later. Qwest’s own witnesses conceded, however, that Qwest’s process is to rely upon information provided by</p>

<sup>60</sup> Although it may be difficult to tell in practice, Qwest states that it agrees rates are outside the scope of CMP and, ironically, even rejected McLeod’s and Eschelon’s joint CMP escalation of Version 27 on the grounds that “discussion around rates associated with an Interconnection Agreement are outside the scope of the CMP process.” Hrg. Ex. E-1, A-7 at 000129.

<sup>61</sup> Exhibit DD-6 (voice mail transcription), p. 1, to Hrg. Ex. E-4 (Denney Reb.); Hrg. Ex. Q-5 (Novak Dir.), p. 8, lines 25-26 (“Qwest denied the request because Eschelon did not have an expedite amendment.”).



#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		CLECs at the time of the expedite request. (Tr., Vol. II, p. 458, lns 7-17, Novak; Tr. Vol. II, p. 344, ln 1 – p. 345, ln 1, Martain)
30	<p><b><u>Requirement of Cost-Based Rates – FL &amp; KY Versus AZ Order:</u></b> “Now, turning to the last subject -- and Ms. Terry Million will testify about this -- and that is the rate question. And we just heard Mr. Denney say that this setting a cost-based rate is what is necessary. Well, in reality there's a decision from Florida and one from Kentucky saying the opposite. And that is, a request to expedite is, by definition, not required by the Act.” (Tr. Vol. I, p. 177, lns 6-12, Mr. Steese opening)</p>	<p>In Arizona, the Commission in the UNE Cost Docket found that “Qwest is directed to develop cost studies for all services offered in this docket on an ICB price basis in Phase III. Qwest should make every effort to develop reasonable cost-based prices for such services even if it has little or no experience actually provisioning the services.”<sup>62</sup> Because Qwest “offered in this docket on an ICB price basis” the provision of expedites, expedite charges are subject to this order. See Hrg. Ex. E-4 (Denney Reb.), p. 52, lns 1-16; <i>See also Re NewSouth Communications Corp.</i>, 2006 WL 707683 (N.C.U.C. February 8, 2006).</p> <p>The ICB rate for expedites is in the SGAT, and Qwest did not seek or receive prior Commission approval before imposing a “market” based rate. (See Row 36.)</p>
31	<p><b><u>Length of Interval – Whether Superior Service:</u></b> “When Qwest went through the 271 process, it, with this Commission's help and the input of many, said what interval do you need in order to have a meaningful opportunity to compete, and those intervals were set. And they asked that they be speeded up . . .<sup>63</sup> And so they're asking Qwest to put service in place for unbundled loops faster than is necessary by the act. By definition that is superior service, and that means market-based rates should apply.” (Tr. Vol. I, p. 177, lns 13-23, Mr. Steese opening)</p>	<p>Qwest cannot deny that it provides expedited service (i.e., “faster” than its “standard” interval) to itself and its retail customers; therefore, it needs to provide it to CLECs as well. (See Rows 33-34.) To the extent that Qwest is relying upon any difference in retail and CLEC intervals for its conclusion that expedited service for CLECs is “faster,” Qwest ignores its own admission that the Commission has reviewed the intervals in 271 and found them appropriate to give CLECs a meaningful opportunity to compete. After all, Qwest itself takes steps internally to provide the final product to its retail customers. Eschelon receives a wholesale UNE service on the last day of the interval, and then Eschelon must take additional steps to deliver a working service to its customer. As Ms. Johnson testified: Qwest is “comparing apples to oranges because there's still more we have to do after Qwest delivers</p>

<sup>62</sup> Phase II UNE Cost Docket, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75.

See also Exhibit DD-4.

<sup>63</sup> See next Row, #31.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		<p>that loop in five days to make it work for the customer.” (Tr. Vol. I, p. 28, lns 12-14.)</p> <p>Qwest does not perform the end user retail functions for a wholesale service. The intervals appropriately reflect this fact.</p>
32	<p><b><u>Leapfrog – Whether Superior Service:</u></b> “The reaction that no additional charge should be made is, as Ms. Million will testify, the equivalent of this: When you go to a movie theater and ask to sit in the front row, do you pay more than the person in the balcony? Answer, yes. If you are mailing a letter, is it the same cost as if you are overnighting it with one day delivery? Answer, no. You pay more. You are getting a huge benefit, and the thought that you should get it for no additional cost flies in the face of reason. So now from a competitive standpoint, if Eschelon can get a DS1 capable loop and turn it over to the customer in one day and Qwest can't charge them the per fee rate, and Qwest is competing for that same customer and says I'm going to charge you \$1,800 because my tariff requires it to get it in place, who are they going to choose? The rates are not supposed to be used to gain competitive advantage. They are supposed to be used to create competitive neutrality. And what Eschelon is trying to do with expedites is use rates to create competitive advantage, which is exactly why the superior service rules apply.” (Tr. Vol. I, p. 178, lns 1-22, Mr. Steese opening)</p>	<p>This is Qwest's “leapfrog” argument. Ms. Million neglects to recognize that as a wholesale provider and competitor to CLECs in retail markets, Qwest faces a different expedite “fee” than the fee it proposes to charge Eschelon. This fee is Qwest's internal cost of expediting the order. Because Qwest proposes to charge Eschelon an expedite fee that is not based on costs, Qwest's proposal allows Qwest to “leapfrog” ahead of CLECs on unfair and discriminatory terms by using its unique position as a provider of essential facilities. (Denney Reb., pp. 57-58.)</p> <p><i>See also</i> Row 30 above.</p>
33	<p><b><u>Retail analogue:</u></b> “And for unbundled loops there's no retail analog.” (Tr. Vol.</p>	<p>Qwest has claimed both that UNE loops do <i>not</i> have a retail analogue<sup>64</sup> and that UNE DS1 and</p>

<sup>64</sup> In its November 18, 2005 CMP Response, Qwest gave the following reason for its refusal to provide the capability to expedite orders for loops under the Expedites Process: “Qwest does not sell ***Unbundled Loops*** to its end user customers so it is not appropriate to make a comparison to retail in this situation.” *See* Exhibit BJJ A-7 at 000124 (last paragraph) (emphasis added). Although today Qwest attempts to limit this statement to DS0 loops (*see* Albersheim Direct, p. 12, lines 18-19), the statement on its face applied to all unbundled loops.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
	I, p. 177, lns 17-18, Mr. Steese opening)	<p>DS3 loops <i>do</i> have a retail analogue.<sup>65</sup> Mr. Steese continues the trend. Qwest's own witness testified that high capacity (DS1 and higher) UNE loops have a retail analogue, and it is Qwest retail private line. (Hrg. Ex. Q-1, Albersheim Dir., p. 12, lns 18-20.)</p> <p>Although Qwest continued emergency-based expedites (which Qwest now claims are for POTS/non-design only) for DSO loops (which Qwest now claims are not POTS/non-design) after Version 11, Qwest apparently now claims that DSO loops do not have a retail analogue. Qwest says, however, that all unbundled loops (including DSOs) are design services, and Qwest repeatedly testifies that expedites are available for design services (though Eschelon cannot order them today per its ICA). (See, e.g., Hrg. Ex. Q-1, Albersheim Dir., p. 10, lns 1-2: "Qwest provides expedites for designed services". . . .) The question then becomes - at what rate for wholesale customers. (See Rows 36-37.)</p>
34	<b>Expedites for Itself:</b> "and so Qwest isn't doing it for itself." (Tr. Vol. I, p. 177, lns 18-19, Mr. Steese opening)	<p>On July 15, 2004, Qwest said that fee-added expedites would allow CLECs to "expedite without reason" for a fee, "<i>like the Retail and Access customer.</i>" (Qwest Version 11 CMP Response, Att. A-2 at 000062, #3, to Hrg. Ex. E-1, Johnson Dir.).</p> <p>Qwest says high capacity loops have a retail analogue (private line – see Row 33). At a minimum, this means Qwest admits it is doing expedites of high capacity services for itself. In CMP, Qwest said it performs expedites for both its "Retail" and "Access" customers. (<i>See id.</i>) Even assuming there is no retail analogue, "no retail analogue" does not mean "no discrimination." An analysis must be made of whether the access the ILEC provides to CLECs offers a meaningful opportunity to</p>

<sup>65</sup>

Albersheim Direct, p. 12, lines 18-19.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		compete. <i>See</i> Bell Atlantic NY 271 Order at ¶ 44. This standard is no less rigorous. <sup>66</sup>
35	<p><b><u>Same Price for Retail and Wholesale:</u></b>          “And the rates Qwest has applied is the exact same rate that Qwest uses to expedite its own retail circuits, \$200 per day.” (Tr. Vol. I, p. 177, lns 22-25, Mr. Steese opening)</p> <p><i>See also</i> Hrg. Ex. Q-1 (Albersheim Dir.), p. 12, lines 1-4: Charging the same price for expedites for wholesale and retail customers is the “essence of non-discrimination.”</p>	<p>“At the hearing in the Minnesota arbitration proceeding, Ms. Albersheim admitted that the fact that there’s a difference in price between two services does not mean that the lower priced service is a superior service for purposes of determining whether that service is a UNE. <i>In the Matter of the Petition of Eschelon Telecom, Inc. for Arbitration with Qwest Corporation, Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996</i>, Minnesota Public Utilities Commission Docket No. P-5340, 421/IC-06-768, Hearing Transcript, Vol. 1 at page 26, lines 14-18.” (Hrg. Ex. E-4, Denney Reb., p. 51, FN 162.)</p>
36	<p><b><u>RELIEF REQUESTED: Request to Set Rate in this Case – Fee-Added:</u></b>          “And so we, in the end, will ask Your Honor to . . . allow Qwest to charge this \$200 per day rate to expedite. Thank you.” (Tr. Vol. I, p. 179, lns 7-9, Mr. Steese opening)</p>	<p>In this case, until a different rate is set in another proceeding, the Commission should require Qwest to offer an Individual Case Basis (ICB) rate for expedites under the existing ICA for CLECs without an expedite amendment and via amendment for CLECs with an expedite amendment (<i>i.e.</i>, with the \$200 per day rate).<sup>67</sup></p>

<sup>66</sup> The FCC said: “We do not view the “meaningful opportunity to compete” standard to be a weaker test than the ‘substantially the same time and manner’ standard. Where the BOC provides functions to its competitors that it also provides for itself in connection with its retail service, its actual performance can be measured to determine whether it is providing access to its competitors in ‘substantially the same time and manner’ as it does to itself. Where the BOC, however, does not provide a retail service that is similar to its wholesale service, its actual performance with respect to competitors cannot be measured against how it performs for itself because the BOC does not perform analogous activities for itself. In those situations, our examination of whether the quality of access provided to competitors offers competitors ‘a meaningful opportunity to compete’ is intended to be a proxy for whether access is being provided in substantially the same time and manner and, thus, nondiscriminatory. *See* Bell Atlantic NY 271 Order at ¶ 45.

<sup>67</sup> *See* Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) (cited in Complaint, p. 6 at FN 1), at ¶123 (“ . . . If there are no rates agreed to in an interconnection agreement for certain services, then the SGAT, which contains Commission approved rates, should be utilized.”); *see also id.* ¶105 (“In its Report and Recommendation, Staff stated that the rates included in the SGAT should reflect the Commission-approved rates resulting from the latest wholesale pricing docket in Arizona. These rates were most recently set in Docket No. T-00000A-00-0194. If the CLEC interconnection agreement does not include rates for the work or service requested, then Qwest can and should use SGAT rates, as these are Commission-approved rates. However, even for rates included in an interconnection agreement, many agreements provide that they shall be superceded by any Commission approved rates in a generic costing docket. If Eschelon disputes whether Qwest is applying any charge correctly, it has the right to raise the issue with the Commission.”); *Id.* ¶ 108 (“To the extent unapproved rates are contained in Qwest’s SGAT, Staff believes that they should be considered interim and subject to true up once the Commission approves final rates. However, Staff does not believe that there should be any rates in the SGAT that Qwest has not separately filed with the Commission, along with cost support, for prior review and approval. To allow Qwest to simply put rates into effect, without the agreement of the CLEC in a particular case through a negotiated interconnection agreement, could be a great impediment to competition.”). The SGAT contains a Commission-approved rate for expedites.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		<p>The rate would apply when the emergency conditions are not met. (See Row 37.) The Commission has approved an ICB rate for expedites. (Hrg. Ex. E-4, Denney Reb., p. 40, ln 7 – p. 42, ln 6 &amp; DD-4.<sup>68</sup>) The expedite rate is still listed as ICB in the Qwest Arizona SGAT,<sup>69</sup> and Qwest was required to bring changes to the SGAT to the Commission before unilaterally implementing them.<sup>70</sup> Regarding charges, the ICA provides broadly that charges must be in accordance with Commission rules and regulations.<sup>71</sup> <u>A Commission approved rate is in place and should apply.</u></p> <p><u>The Commission should specify that, when calculating the ICB expedite charge, Qwest</u></p>

See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5).

<sup>68</sup> *Phase II UNE Cost Docket*, Phase II Opinion and Order, Decision No. 64922, June 12, 2002, p. 75. Expedite charges are subject to this order, because Qwest “offered in this docket on an ICB price basis” the provision of expedites. *See id.*; *In the Matter of Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts*, ACC Docket No. T-00000A-00-0194 Phase II (“Phase II UNE Cost Docket”), Direct Testimony of Robert F. Kennedy (“Kennedy Direct”), Qwest Corporation, March 15, 2001, p. 1. *See also* Exhibit DD-4 to Hrg. Ex. E-4 (Denney Reb.).

<sup>69</sup> See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 14 of 19 at §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5). *See also* Decision No. 66242, Docket No. T-00000A-97-0238 (Qwest’s 271 application) (Sept. 16, 2003) at ¶¶ 105-106 & 108.

<sup>70</sup> See 271 Opinion and Order, Arizona Decision No. 66201 in ACC Docket No. T-00000A-97-0238, p. 28 (“It is further ordered that Qwest Corporation’s SGAT, as modified from time to time after Commission approval, **shall remain available**, as the standard interconnection agreement, **until the Commission authorizes otherwise.**”) (emphasis added). Despite this order and without prior Commission approval, Qwest unilaterally announced in a Level 1 CMP notice (effective immediately) that the SGAT (which includes the ICB expedite rate – *see* previous footnote) is no longer available for opt-in. *See* Hrg. Ex. E-7.

<sup>71</sup> ICA, Att. 1, ¶1.1.

<sup>72</sup> See Hrg. Ex. E-1, A-7 at 000138.

<sup>73</sup> “Q. Is it your position that the ICB rate is equal to \$200 per day? A. It is my understanding that that is how Qwest applies it.” Tr. Vol. II., p. 27, lns 13-16 (Albersheim).

<sup>74</sup> See Qwest’s Tariff F.C.C. #1, Original Page 5-25 (quoted at Hrg. Ex. E-4, Denney Reb., pp. 62-63).

<sup>75</sup> Eschelon has proposed an interim expedite charge, until a different rate is set in the cost case, in its ICA arbitration. *See* Tr. Vol. I, p. 143, lines 1-3; Hrg. Ex. E-4 (Denney Reb.), p. 8, line 12 – p. 9, line 6.

<sup>76</sup> *See also* MN Arbitrators’ Report, MN OAH 3-2500-17369-2; MPUC No. P-5340,421/IC-06-768 (Jan. 16, 2007) ¶222 (“A TELRIC study should be done.”); MN Order Resolving Arbitration Issues (same MPUC docket; Mar. 30, 2007), pp. 17-19 (affirming and concluding that, instead of opening a new docket to establish the appropriate rate, the matter should be referred to the cost docket already underway). Thus, Qwest has developed a cost study, which it filed in the UNE cost case in Minnesota. *See* Tr. Vol. 1, p. 156, lines 17-22.

<sup>77</sup> See Hrg. Ex. E-3 (Webber/Denney) at JW-C - AZ SGAT Exhibit A, p. 16 of 19, footnote 5 (stating rates will be proposed in Phase III). *See also id.* p. 14, AZ SGAT Exhibit A §9.20.14 for the Expedite rate element (which is listed as “ICB” with a reference to footnote 5). *See* Hrg. Ex. E-4 (Denney Reb.), pp. 41-42.

#	QWEST OPENING - ITS THEMES	ESCHELON REPLY - THE EVIDENCE
		<p>must use Commission-approved rates for any additional work activities performed to expedite an order. For example, if a dispatch is needed due to the need to expedite the service order, Qwest should charge the Commission approved rate for the dispatch. There is also an approved half hour labor rate (which in Arizona is the same rate whether billed as repair or additional labor, other), if Qwest spends additional time due to the expedite itself.<sup>72</sup> An explicit ruling is needed on this point, because without it Qwest unilaterally interprets "Individual Case Basis" to mean a non-individual, market-based rate of \$200 per day that will apply in every case, regardless of what activities are performed in each individual case (e.g., whether a dispatch occurs or not). (Tr. Vol. II., p. 27, lns 13-16, Albersheim.<sup>73</sup>)</p> <p>Qwest may claim that it does not want to calculate an ICB rate based on Commission approved rates in each case (despite approval of such a rate for expedites). <u>In the alternative, based on the evidence in this case, the Commission could establish a maximum rate applying the cost principle articulated in Qwest's previous Arizona tariff retail rate: "in no event shall the charge exceed fifty percent (50%) of the total nonrecurring charges associated with the" order.</u><sup>74</sup> With its former tariff provision, Qwest implicitly recognized that a reasonable charge to expedite an installation would not exceed the charge for all of the work performed in the entire installation; in fact, it would be no more than half. (Hrg. Ex. E-4, Denney Reb., p. 59, lns 13-18 &amp; p. 62, ln 4 – p. 64, ln 2.) The non-recurring installation charges for UNEs are Commission approved rates. Therefore, adopting this principle for expedite charges would also be based upon Commission approved rates – unlike Qwest's "market" based proposal.</p> <p><u>The ICB rate (calculated using Commission approved rates or a maximum rate), or an</u></p>

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		<p><u>interim rate,</u><sup>75</sup> <u>should remain available to CLECs until a rate is set in a cost docket.</u> The Commission should adopt the Staff recommendation “that the rate(s) for expedites be considered as part of the next cost docket.” (Staff Conclusion #7, Staff Executive Summary.) Qwest should be required to develop a cost-based rate for expedites in Phase III. (Tr. Vol. I, p. 155, lines 20-23.)<sup>76</sup> Qwest previously represented to this Commission and CLECs that it would do just that,<sup>77</sup> and it has not sought prior Commission approval to change that course.</p>
37	<p><b><u>RELIEF REQUESTED: Request to Rule on Availability Under Existing ICA - Emergency-Based:</u></b> “And so we, in the end, will ask Your Honor to reject their breach of contract claim . . . .” (Tr. Vol. I, p. 179, lns 7-8, Mr. Steese opening)</p> <p>See also “Qwest should be allowed to keep its existing process in place as the appropriate CMP procedures were followed to implement the changes and improvements to the Expedites and Escalations Overview.” (Hrg. Ex. Q-4, Martain Reb., p. 18, lns 18-20)</p>	<p>“The changes made by Qwest resulted in a limitation to the availability of an existing product rather than an expansion to the availability of an existing product.” (Hrg. Ex. S-1, Staff Testimony, p. 8, lns 15-17.) This abridges CLECs’ rights under their ICAs.<sup>78</sup></p> <p><u>In addition to cost-based expedites (see Row 36), expedites of UNE loop orders should be provided at no additional charge when the emergency conditions are met.</u> (Staff Conclusion #1, Staff Executive Summary; see also Hrg. Ex. E-1, A-7, at 000138, third full paragraph.<sup>79</sup>) Qwest has identified no term, right, or condition of the ICA that requires Qwest to charge for expedites when the emergency conditions are met. In fact, Qwest admits that the ICA provisions stating it “may” charge also mean that it “may not” charge. (Tr. Vol. II, p. 229, ln 23 – p. 230, ln 4.) In the case of emergency-based expedites, Qwest’s cost basis is particularly unfounded, because Qwest</p>

<sup>78</sup> The CMP Document provides: “In addition, if changes implemented through this CMP do not necessarily present a direct conflict with a CLEC interconnection agreement, *but would abridge* or expand *the rights of a party to such agreement*, the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such agreement.” (Qwest CMP Document, §1.0, Hrg. Ex. E-1, BJJ A-9 at 000173.) See Hrg. Ex. S-1, Staff Testimony, p. 39, lns 7-12. (See Row 23.)

<sup>79</sup> See also Complaint, p. 14, lns 1-3, requesting: “An order enforcing the Commission approved ICA to require Qwest to provide such expedite capability at Commission approved rates and, when applicable outage and Emergency conditions exist, at no additional charge.”)

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	<p><i>See also</i> “From a purely practical perspective, it seems incongruous for Eschelon to claim that it does not need to pay an expedite fee when a customer is disconnected due to an Eschelon error. . . . Eschelon should be thanking Qwest for helping them get the service restored.” (Hrg. Ex. Q-5, Novak Dir., p. 14, lns 6-12)</p>	<p>only provides these expedites when resources are available.<sup>80</sup> Qwest incurs no cost to add resources for expediting an order when the emergency conditions are met, because if resources are not available, Qwest simply denies the request. (Hrg. Ex. E-4, Denney Reb., p. 39.)</p> <p><u>When another emergency-based condition (such as medical condition or outage) is met, the expedite should not be denied on the grounds that the CLEC caused the disconnect in error.</u> This is consistent with what was Qwest’s practice. (Tr. Vol. 1, p. 95, lns 15-25, Johnson.<sup>81</sup>) Regarding such disconnects in error, the end user customer should come first. Regardless of the cause of the error, the customer needs its service restored. Note that Eschelon did <i>not</i> request an emergency-based expedite in the rehabilitation center example for a disconnect in error that did not meet any other condition. Eschelon cited the medical emergency condition. (See Row 29.) Eschelon is not asking for emergency-based expedites at no additional charge when the CLEC disconnects in error and no other condition is met. Covad (largely a DSL provider), when explaining its change request for an enhancement to the expedite process to add fee-added expedites, provided an example of a “migration to a new ISP provider” that “isn’t as critical” as a medical emergency. (Hrg. Ex. Q-4 at JM-R1, p. 7 of 9, 2/27/04 Clarification Call minutes.) When a critical condition is met and resources are available, the expedite should be</p>

<sup>80</sup> Qwest’s testimony on this point is inaccurate. See Hrg. Ex. E-4 (Denney Reb.), p. 39, FN 125. Ms. Albersheim testifies that Qwest provides expedites under its fee-added Pre-Approved Expedite process (at \$200 per day) “so long as resources are available.” Hrg. Ex. Q-1 (Albersheim Dir.), p. 64, lines 7-8. Qwest’s own PCAT shows that she has it backwards. Per Qwest’s PCAT, the emergency-based Expedites Requiring Approval (at no additional fee) are subject to resource availability; the fee-added Pre-Approved Expedites are not. See Hrg. Ex. E-2, BJJ-N (Expedites PCAT). Qwest implemented the fee-added process for expedites *not* subject to resource availability (“hence, preapproval”). Tr. Vol. 1, p. 43, lines 5-12 (Johnson); *see also* Hrg. Ex. E-1, A-2 at 000062, #3 [Version 11 Eschelon Comment (“impact resources”) and Qwest CMP Response]; Hrg. Ex. Q-4 at JM-R1 (June 29, 2004 CMP meeting minutes).

<sup>81</sup> See Hrg. Ex. E-1, Att. D, at 000444-000445 (containing examples of CLEC disconnect in errors where Qwest in fact granted the expedite requests for loop orders).



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	<p><i>See also</i> “Q. What are the impacts to Eschelon if Qwest were <i>to revert</i> to supporting expedites for Eschelon under the process that was in place with Version 11 of the expedites and escalation overview?</p> <p>A. All requests for expedites would have to fall under the scenarios that were in place prior to the implementation of Version 11. This would exclude the three new scenarios that were implemented with V22.” (Hrg. Ex. Q-4, Martain Reb., p. 17, lns 14-20)</p>	<p>granted at no additional charge – regardless of which carrier caused the disconnect in error.</p> <p><u>The emergency conditions available to CLECs at no additional charge for emergency-based expedites should include the Version 22 conditions.</u> Version 22 simply documented existing conditions; it did not change those conditions. (Tr. Vol. I, p. 33, lns 8-15, Johnson.) Moreover, Qwest’s characterization of Eschelon’s and Staff’s request as seeking to “revert to” Version 11 as implemented by Qwest is incorrect. Staff recommends offering a fee-added option “as originally requested by Covad.” (Hrg. Ex. S-1, Staff Testimony, Executive Summary, Staff Conclusion No. 2.) Covad’s request for an enhancement to add fee-added expedites, if granted as requested, would not have altered the emergency-based conditions or ongoing documentation of them.</p>